This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

PB
WK
M.X
v. 1
187-71

THE WESTERN LAW TIMES.

EDITORS:

ARCHER MARTIN AND J. T. HUGGARD,

BARRISTERS-AT-LAW.

VOL. I.

WINNIPEG, CANADA.

THE STOVEL COMPANY, PRINTERS.

1890–1.

L18399
JAN 31 1941

CORRIGENDA.

P. 36, l. 22; for "60 x 20," read "40 x 20."
" 45, l. 9; for "18th of October," read "20th of September."
" 65, l. 1; for "watches," read "matches."
" 104, l. 9 from foot; for "objections," read "obligations."
" 104, l. 8 from foot; for "obligations," read "extinction."

INDEX.

A

Act, The Judicature, 119, 224.
Address of Gov. Dallas, 130.
Advertising Barristers, 48, 187.
Æsthetic, A Transcendental, 195.
Amusing Error, An, 109.
Andrews, G. A. F., 202, 222.
Andrews, Mrs. G. A. F., 202.
Articles—
  A School of Jurisprudence, 2.
  A Constitutional Limitation, 17.
  Rise of Law in Rupert's Land, 50, 73, 93.
  Legal Procedure in Manitoba, 115.
  The Canadian Commonwealth, 135.
  The Sheriffs of Assiniboia, 153.
  Parliamentary Government in N. W. T., 177, 203.
  Shall we introduce the Judicature Act? 224.
Attorney and Client, 81.
Attorneys, Delinquent, 62.
Attorney-General v. *Free Press*, 122.
Attorney-General, Speech of, 213.
Apology Demanded, An, 114.
Assiniboia, The Sheriffs of, 153.
Audette, L. A., 80.

B

Baker, G. W., 229.
Bain, W. G., 241.
Bank of Montreal v. Poyner, 234.
Bar, Call to the, 214.
Bar Dinner, A, 190, 231.
Bar Meeting, 210.
Bar, The North-West, 171.
Barristers, Advertising, 48.
Barristers' Roll, 145, 172, 192.
Barristers by Patent, 217.
Bearisto, Wm., 65.
Bench, Criticism of the, 39, 101.
Benchers, Manitoba, 12, 84, 121, 187, 196-7.
Bernard, W. L., 188.
Black, J. H., 241.
Bill, Attorney's, 81.
Black-letter Lawyer, 42.
Board, Dominion Land, 18.
Boorish Judge, A, 169.
Boycotter, A 13th Century, 239
Boyle, W. L., 143.
Brief Career, A, 121.
Briefs, Term, 65, 110, 198, 241.
Brown, F. A., 241.
Burbidge, Mr. Justice, 80.

C

Call to the Bar, 214.
Canadian Commonwealth, The, 135.
Canadian Law Times, 83.
Canada, Slavery in, 243.
Cape Law Journal, The, 234.
Career, A Brief, 121.
Cases, Press Reports of, 32.
Charging a Jury in Bed, 132.
Citation, A new Mode of, 230.
Clark, A. W., 241.
Clarke, O. H., 65.
Client, Attorney and, 81.
Consolidation of Statutes, 126, 141, 171.
Constitutional Limitation, A, 17.
Conviction of a Cow, 85.
Convocation Notes, 196.
Conveyancers, 36, 123.
Counsel Fee, Lincoln's, 85.
Counsel Fee, Right to sue for, 81.

Counsel, Queen's, 82, 114.
County Court Appeals, 106, 189.
Court House, Renovating, 35, 125.
Court of Queen's Bench, 101, 189.
Court Sittings, 126, 236.
Curious Trials, 40.
Curriculum, The, 197.
Custom of Dunmow, The, 130.

D

Dalla's Address, Gov., 129.
Davis, Ghent, 84.
Decisions, English, 66, 87, 110, 133, 149, 198, 220, 241.
Defacing the Law Society's Books, 91.
Delinquent Attorneys, 62.
Dinner, A Bar, 190, 231.
Document, An Unique, 86.
Dominion Land Board, 13.
Dunmow, Custom of, 130.

E

Editorship of Manitoba Law Reports, 47.
English Decisions, 66, 87, 110, 133, 149, 198, 220, 241.
Error, An Amusing, 109.
Etiquette, A point of, 166.
Examinations, Students', 105.
Exchequer Court, 80.

F

Fees of Law Society, 60.
Fees, Action for, 81.
Field, D. D., 118.
Free Press, Attorney-General v., 122.

G

Gladstone, Mr., 36.
Glee, The Lawyers', 216.
Government in the N.W.T., Parliamentary, 177, 203.
Green Bag aud the Supreme Court, 83.
Grimmett, M. L., 198.
Guilty or Not Guilty? 86.

H

Hagel, N. F., 164.
Hamilton, W. C., 121.
Harvey, J. G., 241.
Haverson, J. H., 198.
Heirs, Missing, 237.
Hopeless Ignorance, 173.
Horsman, John, 123.
Howell, H. M., 166.
Hudson's Bay Company, 50–59, 73–89, 93–100, 153–163, 217.
Huggard, J. T., 212.

I

Idol, A Chief Justice's, 63.
Ignorance, Hopeless, 173.
Inkster, Sheriff, 158, 217.
Inkster, John, 158, 217.
Illegal Practising, 167.
Incident, A Legal, 14.
Indian Jurist, The, 169.
Irish Law Times Reports, 233.
Issue, A Late, 183.
Is this Justice? 101.

J

Jameson, R. W., 33.
Judge, A Boorish, 169.
Judges, Portraits of the, 84, 197.
Judicature Act, The, 119, 223.
Jukes & Co., H. A., 167.
Jurisprudence, School of, 2.
Jury in Bed, Charging a, 132.
Jury, A Sussex, 194.
Justice? Is this, 101.

K

Killam, Mr. Justice, 190.
Killam, Mr. Justice, Lecture of, 235.

L

Land Board, Dominion, 13.
Landlady, A Political, 175.
Land Titles Office, 141, 168.
Law Journal Reports, The, 233.
Law Reports, Manitoba, 47, 61.
Law Reportership, 83.
Law, Rise of, in Rupert's Land, 50, 73, 93.
Law, Romance of the, 127.
Law Society of Manitoba, 183, 186, 210, 214.
Law Society's Fees, 60.
Law Society's Books, Defacing, 91.
Law Society's Library, 35.
Law Society's Rules, 70.
Law Stamps, 211.
Law Students' Society, 170, 191.
Lawyer, Black-letter, 42.
Lawyers' Glee, The, 216.
Lectures to Students, 197, 209, 235.
Legal Incident, A, 14.
Legal Oddities, Kentucky, 219.
Legal Procedure in Manitoba, 115, 144.
Legislation, Review of Manitoba, 25.
Limitation, A Constitutional, 17.
Lincoln's Case, 108.
Lincoln's Counsel Fee, 85.

M

Machray, J. A., 241.
Manitoba Act Claims, 107.
Manitoba Law Journal, The, 1, 83.
Manitoba Law Reports, 142, 215.
Manitoba, Legal Procedure in, 115, 144.
Manitoba Legislation, Review of, 25.
Martin, Hon. Jos. Atty-Gen., 12, 122, 164, 165, 213.
Martin, Archer, 211, 230.
Miller vs. McCuaig, 101.
Mills & Ducker, 167.
Missing Heirs, 237.
Monopolies, Trusts or, 65.

Mc

McDonell, Alex., Sheriff, 158, 163.
McCreary, W. F.. 110.
McGuire, Mr. Justice, 195.
McKenzie, Fred., Q.C., 63.
McPhillips, A. E., 210, 244.

N

North-West Bar, The, 176.
N. W. T., Parliamentary Government in, 197, 203.
North - West Territories Reports, 123.
Nugent, F. S., 33, 84.

O

Obituary, 202, 222.
Oddities, Kentucky Legal, 219.
Old Regime, The, 217.

P

Parliamentary Government in N. W. T., 177, 203.
Patent, Barristers by, 217.
Point of Etiquette, A, 166.
Political, Landlady, A, 175.
Porter, J. E., 110.
Portraits of the Judges, 84, 197.
Precedence at the Bar, 145, 172, 192.
Presidents of Law Schools, Secular, 143.
Press Reports of Cases, 32.
Prince, Chief Henry, 80.
Private Prosecutors, 164.
Procedure, in Manitoba, Legal, 115, 144.
Professional Advertising, 187.

Q

Queen's Counsel, 11, 82, 114.
Queen's Counsel, Still More, 232.

R

Read, D. B., 119.
Real Property Act, 141.
Recorder Adam Thom, 43.
Regime, The old, 217.
Regina v. Boyle, 143.
Romance of the Law, 127.
Renovating the Court House, 35, 125.
Reports, *The Law Journal*, 233.
Reports, *The Irish Law Times*, 233.
Reports, Manitoba, 142, 215.
Review of Manitoba Legislation, 25.
Reviews—
  Coutlee on Torrens System, 113.
  Taswell-Langmead's Const. History, 200.
  Hamilton on Slavery in Canada, 243.
  McPhillips on Com. Law Practice, 244.
Revision of Statutes, 141.
Rhyming Will, 14.
Rise of Law in Rupert's Land, 50, 73, 93.
Roll of Barristers, 145, 172, 192.
Rules of Law Society, 70.
Rupert's Land, 50, 73, 93.

S

Salutatory, 1.
School of Jurisprudence, 2.
Secular Presidents of Law Schools, 143.
Sheriffs of Assiniboia, The, 153.
Slavery in Canada, 243.
Solicitors, Advertising, 48.
Song of Uses, A, 108.
Spencer, John, Sheriff, 153, 158.
Star Chamber? Have we a, 183.
Startling Sentence, A, 174.
Statutes, Consolidation of, 126, 141, 171.
Stephens v. McArthur Corrected, 125.
Students' Examination, 105.
Students' Society, The Law, 170.
Supreme Court, *Green Bag* and, 83.
Sussex Jury, A, 194.

T

Tacking, Mr. Just. Killam on, 235.
Taylor, Chief Justice, 197, 209, 214.
Taylor, T. W., jr., 198.
Term Briefs, 65, 198, 241.
Then and Now, 64.
Thom, Recorder Adam, 43.
Trials, Two Curious, 40.
Trial of Warren Hastings, 42.
Trusts or Monopolies, 65.

U

Unique Document, An, 87.
Uses, A Song of, 108.

V

Vacation, 121.

W

Wallbridge, Chief Justice, 63, 166.
Warren Hastings, Trial of, 42.
Waugh, R. D., 123.
Weldon & McLean, 188.
Whealler, A., 65.
Will, Rhyming, 15.
Windybank, H., 122.
Wood, Chief Justice, 14.

THE

WESTERN LAW TIMES.

VOL. I. APRIL, 1890. No. 1.

SALUTATORY.

We are not aware that the unfavorable conditions, which in 1885, led to the untimely decease of the *Manitoba Law Journal* have materially changed for the better. We naturally feel a certain diffidence in entering upon an undertaking which the able editor of our predecessor felt compelled to abandon, and are fully alive to the responsibilities of the venture. The universal regret expressed by the profession when the *Manitoba Law Journal* ceased publication, leads us to hope that a new periodical faithfully and fearlessly devoted to the interests not only of the legal profession of Manitoba, but of the western half of the Dominion, will be favorably received. The necessity of some such journal has, we feel assured, presented itself to the great majority of the members of the bar in the West, and as we can only hope to crown our endeavors with success by the generous support and hearty co-operation of the profession, we trust that that support and co-operation will be accorded us.

A School of Jurisprudence.

A glance over modern Europe reveals the fact that there are two separate systems of jurisprudence struggling for supremacy, the Roman and the English. Each has a distinct individuality and history of its own, although the modern has borrowed largely from its older rival. English law has spread over 47 States in the Union, over Australia and Canada, has supplanted the Hindoo in India, and is almost co-extensive with the British Empire. Roman law, on the other hand, claims supremacy over almost the whole of continental Europe, and is found in all the new world communities of French and Spanish origin. Here the parallel ends. Roman law, in connection with the indigenous civil law with which it mingles, occupies a high place as a factor in mental training. No university is complete without its school of jurisprudence. In England and the colonies, on the other hand, the study of law is left in the control of *guilds*, who restrict it on the practical side and furnish imperfect and inadequate instruction for their students. Every English university relegates jurisprudence to a third or fourth position, subordinating it to the theological faculty. We will endeavor to show that this lack of zeal in the university study of English law is attributable to a historical cause, long since forgotten; that law as a factor in mental training deserves greater consideration than it has received, and that the tendency in Canada and the Northwest is to elevate the theological and arts faculties at the expense of the legal.

1. *The Historical Cause*—The period between the twelfth and fifteenth centuries may be fitly called, the seeding time of the modern university system. During this time the schools of Bologna, Naples, Padua, Florence, Paris and Rome evolved into universities, and students flocked to them in crowds. The earliest schools established at Bologna were those for the study of canonical and civil law. Lombardy at this time was

rising rapidly in population and wealth, and the greater complexity of its political relations, its increasing manufactories and commerce, called for a more definite application of the principles embodied in the codes of Theodosius and Justinian. Bologna, too, when the learned Azo lectured there, about 1200, numbered its students at about ten thousand. Other towns in Lombardy and adjoining states envied the prosperity of Bologna, and soon rival universities of renown, modelled after the mother university, sprang up and drew their professors from her.

Hence arose, in addition to those already referred to, Padua, Arezzo, Perugia, Treviso, Siena and others. Coeval with Bologna, on the other side of the Alps, another university arose whose renown as a theological school spread throughout Latin Christendom. It was the university of Paris. Bologna, while its influence lasted, never changed from being the great school of jurisprudence. Paris rang with theological discussion.

Apart from the broad difference in their organization, the very conception of learning, it will be observed, was different at Bologna from what it was at Paris. In the former it was entirely professional, designed, that is to say, to prepare the student for a definite and practical career in after life; in the latter it was sought to provide a general mental training and attract the learners to studies which were speculative rather than practical. *(a)*

It was the time, too, when the temporal power of the Popes was strongest, and all charters for universities were obtained from them. The church, for reasons of its own, favored the establishment of schools of canonical and civil law. Those for theological disputation were discouraged. Charters for the former were easily obtained, for the latter with difficulty. Hence on the continent the model of Bologna was preferred to that of Paris. Oxford and Cambridge, on the other hand, were modelled after Paris, not Bologna. The result in England then was inevitable. Theology flourished

(a) J. Bass Mullinger, Art. Universities, Enc. Brit.

civil and common law waned. In Germany today the school of jurisprudence is not secondary to any other faculty, either in point of the number of students or in popularity as a university study. *(b)*

The separation of the theoretical from the practical in the study of law in England arose thus: Civil and Canonical law found a zealous student in Theobald, a Norman abbot, who was elected to the See of Canterbury in 1138. He desired to instruct the people in its precepts, and placed Roger, surnamed Vacarius, at the head of it. This supplanted the common law in the university. England had already felt the effect of the attempt at Normanizing, and treated the new learning with distrust. Hence King Stephen issued a proclamation forbidding "the study of the laws newly imported from Italy."

After the Reformation, many causes conspired to prevent the study of English law in the universities, the principal one being the fact that the instructors of the youth were wholly ignorant of the merit of the common law as an educational factor. *(c)* We are afraid this prevails to-day. Then it followed that it was studied by the laity, and a great impetus was given to its pursuit by the fixity of the Common Pleas Court at Westminster, instead of perambulating all over Britian at the king's skirts. Students gathered around the courts, formed associations, and began, under royal sanction, to confer the degrees of barrister and sergeant. Coke says that "a judicial university" was formed, with its readers, lecturers, moot courts and libraries, and that King Henry forbade the regent of any law school teaching within the city. Thus at one time 2,000 students were in attendance at this incipient university. It will be observed that here the common law of England and the practice was studied entirely unmingled with the hated "new laws of Italy." Fortescue says that students of the Inns were taught "to dance, sing, and play instrumental music." The modern law student in

(*b*) The Cost of Universities.—Hill in *Forum*, November, 1889.

(*c*) Stephen's Commentaries, Cap. I.

Canada recently would have been thankful if his benchers had even made as simple a provision as that for his benefit.

There is, therefore, abundant evidence that ample provision for legal study was formerly made in England, and that this continued with more or less vigor down to the commencement of the 18th century, when a langour, similar to that which affected the church and the universities, intervened, until the fulfillment of the merest forms sufficed to confer the dignity of an advocate. This was maintained until recent years, when from 1845 the necessity for suitable training of young men aspiring to forensic honors has again become recognized. The form of a law society with legal instruction in its undeveloped state was apparently borrowed by the Law Society of Upper Canada at a period when England gave no heed to the instruction of students. With a vim in other respects admirable, the Law Society of Manitoba borrowed the antiquated clothes of Ontario's law society, and has apparently not yet followed the recent improvements.

The arrangements at present in force in England appear to be tentative only, and attempts have been made to carry out a more systematic education, to be developed eventually into a legal university. Thus, we see, through theological control, law has been driven out of the university. Since the secularization of Harvard, Yale and Columbia Colleges in the United States, these institutions have organized very strong schools for the study of jurisprudence. Hence the remarks of Bryce: "Notwithstanding the laxity in not enforcing a fixed standard, and the absence of legal corporations, the level of attainment in some cities is as high or higher than among the barristers or solicitors of London. This is due to the extraordinary excellence of many of the law schools, and modern England seems to be alone in her comparative neglect of the theoretic study of law as a preparation for legal practice." *(d)*

We therefore think it has been fairly shown that the evil has arisen owing to the supplanting of civil law—English and

(*d*) Bryce's Am.Commonwealth, Vol. II, p. 487.

Roman—in the univerities by theology and arts, and the consequent separation of the true teaching faculty, the university, from its students. How long will this unnatural separation continue? Are we bound to follow English precedent to the echo? Is not this the time when Canadians should re-unite pupil to teacher?

2. *That Law as a factor in mental education deserves greater consideration than it has received.*—Perfection (including happiness) is the one end of our existence, and it is evident that, absolutely speaking, studies and sciences must be judged useful as they contribute, and only as they contribute, to the perfection of our humanity; that is, to our perfection simply as men. Now, the perfection of man as an end and the perfection of man as a means or instrument are not the same, but are opposed. The most preferable, therefore, is the perfection of a man as a man, and the education that tends to that is the most useful education. The education that tends to make a man fit for a railroad superintendent is surely preferable to that that makes him a duly qualified railroad "navvy." The one is styled the liberal, the other professional education. A few of the professions, indeed, as requiring a higher development of the higher faculties, and involving, therefore, a greater or less amount of liberal education, have obtained the name of liberal professions. *(e)* Law is one of these. The tendency, too, in English law as a study has been from the concrete to the abstract, as we shall show later. At the time when the "judicial university" was formed, the allegiance given to forms was the characteristic of English law.

In nine cases out of ten, the question then was not the decision of the action on the merits, but rather whether the plaintiff was fortunate enough to have brought his action according to the proper one of the, we may say, countless forms of action then prescribed. This period had its parallel in early Roman law, and, as in the latter, the former may be called the *formulary* period of English law. In Rome,

(*e*) Hamilton's Metaphysics, Lects. I and II.

the Prætorial jurisdiction, like our modern equity, softened the harsh rigor of petrified forms, and gradually leavened the mass, until the same stage was reached as modern England has seen by reason of the Judicature Acts.

This shews the increasing subordination of practice to principle; in other words, the effect of pure reasoning, unadulterated by antiquated environment, is rising to the surface. The moment simplicity is attained in legal procedure, then the law student will give his time to the study of abstract rule.

The study of law fits one especially well for public life. A State's life depends on its public men. If we give university training at all at the expense of the State, the State should demand that training to be given which will attain its objects best. It is unnecessary to emphasize that no other means of education so qualifies a man for the active duties of a citizen, as a study of the fundamental laws at the basis of his citizenship. We no longer have the old Athenian Agora for the instruction of citizens in State craft. The newspaper has taken its place, but not as effectually as one could desire.

The spontaneous combustion of socialism is one result of the improper training of citizens. Socialists dig and delve, without light, into the depths of the laws surrounding their social existence. They want light, and that which they think is light and right experience, often teaches is dangerous.

Pregnant questions may be asked as to who modelled the American Constitution, and made possible the American Nation of to-day? The answer is, lawyers. Then, let us turn to that of Canada, and call up, one by one, the founders of confederation; we pause for an answer, and it is "lawyers," and therefore, we say, that a study of law fits a man pre-eminently for the active duties of a citizen.

Modern jurisprudence furnishes may minds worthy of study. Frederick Pollock says of the immortal Savigny: "I owe it to you and my friend Professor Bryce, that, daring to be deaf to the counsels of shallow wisdom that miscalls itself practical, I turned from the formless confusion of text books and the dry bones of student's manuals, to the immortal work

of Savigny—assuredly the greatest production of this age in the field of jurisprudence, nor one easily to be matched in any other branch of learning, if literary form, as well as scientific genius be taken into account. Like one in a Platonic fable, I passed out of a cave of shadows into clear daylight. The vast mass of detail was dominated by ordered ideas and luminous exposition, equally removed from the futile struggling of a mere handicraftsman, with the multitude of particulars, and from the pedantry which gains a show of logical symmetry by casting out unwelcome facts, the master proved not by verbal definition, but by achievements in act, that the science of law is a true and living one;" *(f)* and any one who has read the only translated work *(g)* carefully and intelligently, will echo his words. It is needless to continue, but let us simply point out that civilization furnishes no more definite means of education than that upon which the talents of some of the most eminent Anglo-Saxons have been been expended, during the centuries of its develepment—English law.

3. *The tendency in Canada and the Northwest has been to elevate the theological and arts faculties at the expense of the legal.*

Before discussing this part, let us state that the view we take of theoretic and practical law, as to the study of it by the legal profession and the legal university, is this: With Australia, Canada and India and its codes, the ever swelling stream from the 48 States in the Union, and finally, with the old mother land, all contributing their quota to the ever increasing tide of commentaries on English law, the student is compelled to study principle rather than practice. The day of case-law law as a means of general study has long since gone by. Coke's advice to a student to read a regular quantity of the reports from the Year Books to date, is now the height of absurdity. A student who would undertake to read one week's flow of the tide would, we think, find the most of

(*f*) Pollock on Contracts, Preface.

(*g*) Savigny, International Law, Guthrie's translation.

his time occupied during the three year's course. The only refuge then of the practitioner and student alike is in the theoretical study of law as illustrated by example. This places them on a common basis with the object of a university school. We therefore regard the theoretical study of law as the main object of both student and practitioner, and have so regarded it throughout this essay. So much, then, by way of digression.

It is almost impossible to ascertain the exact number of theological faculties or schools in Canada. A careful computation from private sources show that in five of the principal cities of the Dominion the number of colleges or faculties established teaching theology is 25. Law is taught in 4. If we take the city of Winnipeg for example, we find four theological schools, St. John's, Manitoba, Wesley and St. Boniface, and not one of law. Truly we ought to be a people fond of religious discussion—in fact, every one of us, by contact or otherwise, should be a Delitsch, a Lightfoot, or a Dollinger, as far as our abilities are capable, if opportunities avail anything.

The recent proposal to spend $12,000 to establish chairs of science and languages in the University of Manitoba by the government demands attention. A plain object is to enable the colleges to further develop their theological faculties at the expense of the state, and shift upon it the most burdensome of the arts course. A careful computation of the number of law students throughout Manitoba engaged in the active study of law at the present time leads one to believe that there are 60 persons so occupied. Not one dollar of public money is spent in their instruction or education. The number of students that the $12,000 will provide instruction for will not within the next ten years average annually 20 at the most, and from experience we think 20 a high estimate. We can not be convinced that it is more beneficial to the State to make geological, mathematical or lingual experts than to make legal experts. Not one of these is being specially trained to fill a

public position, yet we have the bench, bar, and magistracy to fill solely, if we can, with men versed in law.

We therefore think that it is the State's duty. If it provides instruction for one class of citizens, there is absolutely no reason why another class, especially required by the State for the most important functions of civil government—the administration of justice—should be overlooked. In other words, we think that the faculties of theology and arts have been elevated at the expense of the legal.

This is a new country. States to the west of us are in process of formation. We, in Manitoba, have not passed the formative period, and it may now be truly said that this is the growing time of the nation. Problems of Civil Government, which the United States solved by a revolution, in a decade, promise to occupy our time for a century.

On careful and considerate constitutional development depends our status as a Canadian nation. No one believes that Federal Government, as it now exists, is a permanency. There is a period of unrest, a longing for something better. What that is, we leave for each one to judge for himself; we have our own opinion. But, when the crisis comes, as come it must, and our future destiny is to be decided, and securities for its continuance are demanded, we are greatly mistaken, unless the lawyer occupies his accustomed position as the guardian and moulder of the New Nation.

NOTES AND COMMENTS.

QUEEN'S COUNSEL.

The subject of the late appointments of Queen's Counsel by the Dominion and Ontario governments is as trite and unattractive, as the appointees are in most cases incompetent and undeserving, not to say, in certain instances, absolutely dishonorable. We cannot refrain even at this late date, it being our first opportunity, from joining in the vehement remonstrance which has risen from all parts of Canada against this shameful exhibition of the prostitution of a once honorable and coveted distinction to the basest and most shameful ends of party favoritism. The thought that—to use the words of a correspondent in the *Canada Law Journal*—" it is safe to say that in no other part of the British Empire are Police Court practitioners and Division Court advocates similarly honored," is enough to call forth the righteous indignation of any gentleman at the Bar, and to make him shrink from the ridicule which is cast upon the profession by such appointments. The silk can never, we fear, in this country at least, be cleansed from the stains which have been smeared upon it by unclean hands, and we can only, in all kindness of heart, wish for its speedy abolition. The last representatives of the honored and ancient race of Serjeants-at-law, a race which we may say is of knightly precedence, while doubtless anticipating with keen regret the speedy extinction of their order, yet have consolation in the thought that it will sink into an honored and respected grave, untainted by the debasing influences which have blighted the younger dignity. The polluted touch of the unscrupulous and dishonest politician has succeeded in degrading an honorable estate, which many in the highest circle of the law have received with gratitude and borne with pride. With no disposition to discuss the Man

toba appointments, yet we would point out to those who, while entitled equally with the appointees, yet have been fortunate enough to escape the dignity (?), that they are in the same position as the Leader of the Bar—the Attorney-General. The mere fact of the tenure of the office was deemed a sufficient reason in the case of his predecessor; and, aside from his undeniable fitness for the honor (?) it cannot be denied that Mr. Martin is the most industrious and painstaking Attorney-General Manitoba has ever had.

MANITOBA BENCHERS.

The ill-advised action of five of the Benchers of Manitoba in resigning office, most inopportunely, on account of a certain resolution of the Bar, has resulted only in placing them in an unenviable position. The offending resolution—that the term of benchership should be a yearly one—has not been considered by the remaining Benchers as a vote of want of confidence, which inference the mover and seconder strongly repelled. In any event, if they thought fit so to consider it, they should have resigned on the prior unanimous resolution which directly negatived their views and actions in regard to the Court House question; manifestly a motion expressing want of confidence much more than the offending one, yet strange to say, no one took umbrage at it. This ill-timed proceeding has had the effect only of blocking much needed legislative reforms which were receiving most favorable consideration and many matters will have to remain in their present unsatisfactory state for another year. We are not favorably impressed by such petulant actions, and it would be a matter of small regret with us if some of these gentlemen, and one in particular, whose conduct in regard to a recent *re* Attorney proceeding has caused most unfavorable comment, were to permanently remain in their voluntary retirement. It is rumored that certain of them have already seen the error of their ways and are willing to return to the fold. We trust that the foregoing events may in future have a salutary effect on their conduct, and in general, that the benchers may evi-

dence a more lively disposition to further the interests of the profession and conform more readily to the wishes of the bar than, with some notable exceptions, they have hitherto done. There are matters more deserving of the grave attention of these legal representatives than farcial endeavors to preserve an excess of dignity which can only be attended by consequences like those which resulted from the well meant but disastrous efforts of the humane she-elephant who undertook to hatch out the eggs of a deceased jungle-fowl.

DOMINION LAND BOARD.

Just upon going to press we received reliable information from Ottawa that it is in the serious contemplation of the Minister of the Interior to recommend the abolition in the very near future of the Dominion Land Board in Winnipeg, with which has practically rested the determination of all land matters in Manitoba and the Northwest since 1882. We cannot too strongly deprecate such a course of proceeding, which practically means the transferring of the affairs of the present impartial and semi-judicial board to the control of the party machine at Ottawa. This will only have one result, the serious retardation of business, and a reversion to all those objectionable features which the Board was established to avoid. We strongly urge that united and immediate action be taken by the legal profession and the general public throughout the West to avert such a grave error in public policy. We shall have occasion hereafter to further allude to this matter.

FLOTSAM AND JETSAM

A LEGAL INCIDENT.

The Province of Manitoba may justly claim to have issued, authoritatively by the Queen's printer, one of the most unique productions ever known in this or any other country. "The County Courts Act of 1879," prepared by Chief Justice Wood, with the notorious and now very scarce preface, is the Act referred to. It is modestly entitled by the author, as being "A complete Code of Law, Practice and Procedure in County Courts, designed to make every man his own lawyer." We give the preface *verbatim*; the italics are the Chief Justice's, the small capitals are ours.

PREFACE.

"The vast importance to business men, and to the public in general, "of a simple, plain expeditious and inexpensive mode of collecting "debts, of seeking redress for wrongs and of testing rights, has induced "the publication of the '*County Courts Act*' in its present form, "separate from the General Statutes of the Province."

"The jurisdiction of County Courts is sufficiently extended to em- "brace most of the ordinary business transactions—being $250 in *debt*, "*covenant* and *contract*, and $100 in most actions of *wrong*."

"The Act, as a whole, is A COMPLETE CODE OF LAW, PRACTICE AND "PROCEDURE, IN ALL THESE ACTIONS; AND SO PLAIN AND SIMPLE IS "IT IN ITS PROVISIONS, THAT ANYONE OF THE MOST ORDINARY UNDER- "STANDING CANNOT FAIL IN THE CONDUCT AND MANAGEMENT OF HIS "OWN LITIGATION IN THESE COURTS."

"By this Act, the County Courts are made just what they ought to "be, *the people's and the poor man's Courts;* IN WHICH THERE IS "LITTLE ROOM AND LESS USE FOR PROFESSIONAL GENTLEMEN, BUT IN "WHICH EVERY MAN MAY WITH PROPRIETY AND ADVANTAGE, *be his* "*own lawyer*, 'WITHOUT HAVING A FOOL FOR A CLIENT.' "

"Every business man should have a copy of this Act upon his desk; "and, as he has occasion to have recourse to the County Courts, by a "slight attention to the provisions of the Act, and *by attending to his* "*own business himself*, he cannot fail, in so far as the law affords re- "dress, in being amply compensated for his personal intervention in his "own business."

"The prediction is hazarded, THAT SO FULL AND COMPLETE IS THIS "ACT, THE 'WISDOM' OF THE LEGISLATURE WILL NOT, FOR MANY "YEARS, HAVE OCCASION TO SUPPLEMENT IT WITH AMENDMENTS."

"The public will expect, and no doubt will not be disappointed in "its anticipation, that the judges, AND ESPECIALLY THE GOVERNMENT,

"WHICH HAS, WITH DOUBTFUL PROPRIETY, retained in its own hands "the appointment of clerks and bailiffs, will see to it, that the provisions "of the Act are administered AND CARRIED OUT WITH THE SAME COM-"PLETENESS, AND IN THE SAME SPIRIT AS THAT IN WHICH THEY HAVE "BEEN CONCEIVED AND FORMULATED."

"A copious analytical index has been added, by means of which "ready reference may be made to any matter of law, practice or proce-"dure in the Act."

Winnipeg, July, 1879. EDITOR.

The consternation of the Government, when this extraordinary announcement was brought to their notice, may be easily imagined, and their anger and indignation were not probably mollified by the reference to their actions contained in the penultimitmate and ante-penultimate parargraphs. The offending volumes were bundled forthwith into a hand-cart and taken back to the binders, where the objectionable leaves were torn off and the books rebound. Two or three copies, however, escaped the general destruction, and one of them is in our possessiou in the original binding. There is a certain grim irony in the words: "The prediction is hazarded that, so full and complete is this Act, the 'wisdom' of the Legislature will not, for many years, have occasion to supplant it with amendments," for if ever an Act became a reproach and scorn among the profession because of seemingly interminable amendments, this Act is the one so distinguished above all others, and that *not* by the "wisdom" of the Legislature.

RHYMING WILL.

The following strange will is taken from *Notes and Queries*, Nov. 2, 1889, and is that of Mr. William Hickington, proved at the Deanery Court at York, England. The date is 1770:—

"This is my last will,
I insist on it still,
So sneer on and welcome,
And e'en laugh your fill.
I, William Hickington,
Poet, of Pocklington,
Do give and bequeath,
As free as I breathe,

To thee, Mary Jarum,
The queen of my harem,
My cash and my cattle
With every chattel,
To have and to hold,
Come heat or come cold,
Sans hindrance or strife,
Though thou art not my wife;
As witness my hand,
Just here as I stand,
The twelve day of July,
In the year seventy.

Signed,

William Hickington.

THE

WESTERN LAW TIMES.

VOL. I. MAY, 1890. No. 2.

A Constitutional Limitation.

"No State shall pass an . . . *ex post facto* law, or law impairing the obligation of contracts."—Const. U. S., Art. 1, Sec. 10, in part.

Every government in every age has had constitutional limitations. At some moment the hand of the legislator was checked. These limitations may be expressly set forth in the constitution, as in the United States, or the omnipotency and supremacy of Parliament may be checked by the irresistible force of custom, usage, precedent and the sacredness of property and civil rights, as in England.

It matters not whether we regard the sovereign or the people as the source of power—these checks, these limitations, exist. It matters not whether they are as futile as the Parliament of France under Napoleon the Dictator; as effectual as the House of Lords and the Crown, backed by the wealth of precedent accumulated through the centuries, is upon the Commons of England; or as ironclad as the limitations separating the legislative, executive and judicial functions, and defining the powers of the Federal and State Legislatures in the national government of the United States. They may become fictions, yet they do exist. So great is the stability and firmness of the English constitution, although it is an unwritten one, that the most effectual means of checking improvident legislation has expired

through disuse. We refer to the veto power of the Crown, which Queen Anne exercised for the last time in 1707.

It is proposed, in view of the frequent exercise of this veto power in Canada, as a check on improvident legislation, to question the right to use it for such a purpose, and humbly suggest a more satisfactory remedy.

There seems to be a concensus of opinion that the government of England, although monarchal in form, has become a Parliamentary democracy. An able writer says: "Englishmen have, in accordance with our bit-by-bit "reform, at last established a democracy, without estab-"lishing those safeguards which in avowedly democratic "countries, such as the United States, exist. The time "may come when Englishmen may borrow from America "the constitutional provisions which, by delaying altera-"tions in the constitution, protect the sovereignty of the "people."(*a*) Much more so, then, do these words apply to this Dominion of ours. Although we borrowed the monarchal form of government from England, yet, unlike her, we have what purports to be a constitution; unlike her, too, it is a written one, and unlike her, we have a veto, unlimited, irresponsible and undefined. It is sometimes called into activity for mere party reasons. and at others it is exercised so unjustly that it almost fans the smouldering embers of a discontented people into an incipient blaze.

The history of the veto in England has been unique. From the earliest times, when it existed in full vigour, until it was last exercised, the process has been one of gradual decay. Were it to be exercised to-day, in opposition to the will of the people, expressed in the Commons assembled, a revolution would ensue. It is easy to anticipate which would be the first to yield, the Sovereign or the people. Thus Bagehot says: "But the Queen has no

(*a*) Dicey, A. V., "Ought the Referendum to be Introduced into England," in *Contemporary Review*, April, 1890.

such veto" to reject bills. "She must sign her own death-warrant, if the two Houses unanimously send it up to her." (*b*) However inactive in Home affairs, the veto has become, it has been often exercised in the disallowance of Colonial enactments, where Imperial interests are affected The people of Canada, as long as they remain subjects of the British Crown, will peacefully submit to such interference and admit the justness of it.

Let us now turn to Canada. It seems agreed that the Governor-General in Council, as representing the Sovereign, is justified in interfering with the exclusive powers of Local Legislatures, only when their enactments extend beyond the limits of Provincial authority, or affect the general interests of the Dominion. (*c*) But, why interfere with Local Legislation at all when it is *ultra vires?* This interference, on this ground, began before the existence of our Supreme Court and has continued, oblivious of its existence. Unless some injury is likely to ensue, if the veto be not exercised, we think the exercise of it implies a lack of confidence in the Courts to deal with the matter.

More pregnant to our subject, is the question: Is the veto power of the Governor-General declining; in view of the apparent reluctance to exercise it; (*d*) the hostility engendered in many instances; (*e*) the lack of definite principles defining its exercise; the semi-judicial functions, without an appeal, that it assumes, when it interferes with Provincial Legislation; the increased lack of respect for

(*b*) The English Constitution, 5th ed., p. 57.

(*c*) Todd—Parliamentary Government in the British Colonies, p. 343.

(*d*) A Committee of the Privy Council, Canada, when advising the disallowance of a bill reported thus: "The Committee desire to record the expression of their constant anxiety, that the action of Provincial Legislatures should be interfered with, under the power of disallowance, as seldom as possible." Sessional Papers, 1885, No. 29.

"If a veto power becomes inconvenient or distasteful, it will be abolished just as, in effect, it has been abolished in England." Cooley, in Am. Law Review, vol. 23, p. 321.

(*e*) As in Manitoba, in 1886 and 1890.

it, on account of the frequent exercise; the sentiment in the Provinces, that it is being used, as a means to limit their exclusive rights; and especially the feeling that it is brought into play by a semi-irresponsible power; for, responsibility to the people is the key-stone of the British constitutional system? We ask, is this veto likely to decay, just as the higher form of it has decayed in England? We think so, and for this reason, in addition to those pointed out. It is one of the strongest planks in the platform of the Liberal party to-day, that its leaders have been endeavouring, since Confederation began, to define and limit this power, and retain it, within fixed limits. Witness the long struggle, Edward Blake—as Minister of Justice—has made, and—as a private member—is now making. The first effort, to check and define it, was made by him; and, his recent motion in the House of Commons, is apparently in the same direction. We believe that its end is already marked, and in proof thereof, have only to call attention to the limits upon its exercise to-day, with that defined by Lord Granville in 1867. (*f*) The process of decay has been steady, and if the Liberals, when in power, enforce the principles they urge at the present time, a Court will be established, with jurisdiction to settle conflicting interests and the end of the veto power. The greatest Confederation the world has ever seen—the United States—has left these questions to the Courts; why not we? (*g*)

The veto lacks in one thing as it at present exists. The experiment of entrusting the affairs of a nation to a handful of people, which occurs in some of the Western Provinces, is one of the most peculiar in the history of constitutional government. It is a feat in the art of self-government. In *Powell* v. *Apollo Candle Company, Ltd.*,

(*f*) Canada Sessional Papers, 1870, No. 35, p. 34.

(*g*) It may be as well to state that the President can veto Acts of Congress, and the Governor of each State its own enactments; but there the veto ends.

(*h*) the Judicial Committee of the Privy Council said, that Provincial Legislatures are "in no sense delegates of, or "acting under, any mandate from the Imperial Parliament. "When the B. N. A. Act enacted that there should be a "Legislature for Ontario, and that its Legislature should "have exclusive authority to make laws for the Province "and for Provincial purposes in relation to the matters "enumerated in Section 92, it conferred them not, in any "sense, to be exercised by delegation from, or as agents of, "the Imperial Parliament, but authority as plenary and as "ample within the limits prescribed by Section 92, as the "Imperial Parliament, in the plenitude of its power, pos-"sessed or could bestow. Within these limits of subjects "and areas, the Local Legislature is supreme, and has the "same authority as the Imperial Parliament." Applying this in the Provinces of the Dominion, where a second chamber has been abolished, we find a Government practically without limitations. The Governor-General's veto does not act as a revising-chamber, and if there is a necessity for the one, the necessity for the other is urgent. The Lieutenant-Governor must follow the advice of his Ministers and has no veto. It is true, he is given the power of disallowance in precisely the same terms as the Governor-General, yet he has lost it, in twenty years. (*i*) Save where Dominion interests are affected, the Governor-General is not supposed to interfere. Hence we find one chamber with unbridled power, practically without a limitation—a state of things not contemplated by the constitution—and unparalleled by any State in the union.

Every people should be able to limit the caprice of a factitious majority in their legislative halls.(*j*) As we exist to-day, a revolution in our government might be proposed and executed without an appeal to the people. The

(*h*) 3 Cartwright's cases.

(*i*) B. N. A. Act, secs. 55 and 90.

(*j*) Dicey, in article cited.

Manitoba Legislature has practically revolutionized our local affairs since the last election. Disallowance has been abandoned, a new municipal code enforced, railway enterprises undertaken, school and language questions settled, all without a decision of the people. Not that the Referendum ought to be introduced into the Dominion; but there should be some limitation upon legislatures having exclusive jurisdiction over "property and civil rights."

The United States solved the problem pointed out, by inserting in its constiitution *inter alia* the text cited at the head of this article. They virtually said: Let *ultra vires* be defined and referred to the courts; let questions of public policy be ascertained in the consttution and decided by the proper tribunals. This brings us face to face with the legislation relating to tax deeds and interest, recently disallowed by the Dominion Government and immediately re-enacted by the Local Legislature. Had the B. N. A. Act contained our text, this defiance would not have arisen. One Act, validates all past tax sales, the other removes jurisdiction from the courts to question the validity of tax sales as far as excessive interest is concerned. Under the text it has been repeatedly held in the United States that a retrospective statute, curing defects in legal proceedings where they are in their nature irregularities only and do not extend to matters of jurisdiction, is not void on constitutional grounds unless forbidden. Of this class are statutes to cure irregularities in the assessment of property for taxation and the levy of taxes thereon, irregularities in the organization and elections of corporations, etc., (*k*) for a party has no vested right in a defence based upon an informality not affecting his substantial equities.(*l*) But if a statute were to undertake to make a law preventing the legal remedy upon a contract lawfully made and binding on the party to it,

(*k*) (*l*) Cooley on Constitutional Limitations, pp. 457, 456.

there is no question but that such legislature would by such act exceed its legitimate powers. Such an Act must necessarily impair the obligation of the contract within the meaning of the constitution.(*m*)

Had the text, therefore, been in the B. N. A. Act, we could have had the constitutionality of the Act removing jurisdiction attacked on two grounds: one that it was *ultra vires* of the Local Legislature, in that the Dominion Parliament only can legislate as to interest, and the former could not infringe upon that jurisdiction; and the other that it was a retroactive statute and affected the obligation of contracts, and was therefore unconstitutional.

Slipshod legislation always tries to protect itself under retroactive laws. The Manitoba Legislature is too fond of dealing with past rights. As for the confusion arising through the question of interest, it deserves no sympathy in the present crisis, for it was warned in 1883 that its municipal legislation was, on the question of interest, *ultra vires*, (*n*) and that is the very legislation these acts intended to cure.

If this legislation is against public policy, how much more so must the Acts already passed, 46 and 47 Vic., Cap. 1, Secs. 311, 315, 319, 325 and 326, be; absolutely vesting lands sold for taxes in the purchaser after four years, as happened in a case reported in this number. The tax deed was allowed to issue within one year from

(*m*) *Call* v. *Hagger*, 8 Mass., 430.

(*n*) The undersigned has before had occasion to express the opinion that where Local Legislatures enact provisions relating to interest, it is advisable that this be so done as to recognize the legislative authority of Parliament in this respect. No objection is taken to the Legislature giving a corporation power to pay any legal rate of interest that may be agreed upon, or any fixed rate with the maximum at the time allowed by law. Sir A. Campbell, commenting upon 44 Vic., Cap. 36, Secs. 78, 81 and 96, the Charter of the City of Winnipeg [similar provisions exist as the amended Acts], and the Lieutenant-Governor's attention was called to this very matte. *Canada, Sess. Papers*, 1885. No. 29, p. 75. See also p. 56.

the sale. This Act was never even commented upon, because there was no doubt as to the jurisdiction. As to the public policy of it, that is another question.

In every civilized State, retroactive laws have been treated with disfavour and condemned in the strongest terms. Some of the States have expressly prohibited all retroactive laws of whatsoever nature, by the constitutions, *e.g.*, Texas, New Hampshire, Ohio and Tennessee. It has been said judicially, that that is not legislation which adjudicates in a particular case; prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than any other attribute of Government. (*o*)

However, there is no doubt but that the unpleasant feeling, which has arisen in Manitoba over the latest exercise of this erratic veto power, would never have arisen, had the suggested limitation existed and a tribunal been endowed with jurisdiction. Friction is the deadliest enemy of Government.

To digress for a moment. There is, we think, no doubt but that under the present practice, Lieutenant-Governor Schultz was justified in reserving the bills above referred to. He is a Dominion Government official. But, as long as we preserve fictions in our Government, instead of Departments endowed with power, this must be expected. The attack was not one against the Lieutenant-Governor because of his action, but rather on account of the innate feeling, in every citizen, that every Department of Government must be responsible for its acts. If the Lieutenant-Governors in the Provinces, by virtue of their position, stand in the way of the will of the people as expressed in the Legislatures, so much the worse for the

(*o*) *Ervines' Appeal*, 16 Penns. St., 265–266. For Canadian cases, see *In re Goodhue*, 19 Gr., p. 386, 418; *Cowan* v. *Wright*, 23 Gr., 623; *Parsons* v. *Citizens Insurance Co.*, 4 Ont. App. R., p. 100; *Steadman* v. *Robinson*, 2 Pugs. Rep., p. 593.

position. The irresponsible must yield to the responsible. If the English people, with all the wealth of tradition and sacredness attached to the Crown as head of the Church, will not endure fictions, much less will we.

In conclusion, if we cannot satisfactorily amend the B. N. A. Act, surely the veto power can be delegated to be used in accordance with the spirit of our text, for the doctrine that "*Optima est Lex; quae minimum relinquit arbitrio Judicis*" (*p*) permeates English law.

Review of Manitoba Legislation for 1890.

We propose to confine ourselves to those Acts which are of particular interest to the legal profession. We shall not notice those relating to municipal, educational, election, liquor license, game, railway, or similar matters. Unless otherwise mentioned, all legislation came into force on 31st March last past.

CHAP. 1. By Sec. 4, "The Act to Prevent Frauds and Perjuries," Con. Stat., Cap. 44, is repealed. The Statute of Elizabeth, as amended, covers the scope of the Act, which, although possibly an unnecessary piece of legislation, yet was one of the best drafted Acts in our Statute book. The authorship is generally attributed to Chief Justice Johnson, formerly Recorder of Rupert's Land.

CHAP. 2. By Sec. 2, the time, as used upon the Can. Pac. Ry., known as central time, is declared to be the "Standard time of this Province."

By Sec. 4, mortgages of "growing crops and crops to be grown within one year from the date of such mortgage" are valid, when executed as therein provided.

(*p*) Bac. de Aug. Scient., lib. 8, c. 3, tit. 1, aphorism 46.

By Secs. 6 and 7, "probate or letters of administration shall have effect over the personal estate and lands of the deceased in all parts on Manitoba," etc.

By Sec. 10, certificates of judgment may issue on a judge's order for payment of money, after being duly filed.

By Sec. 15, the party demanding a jury must, at the time of filing the paper making such demand, pay the jury fee of $25. *Query.* Supposing he files the notice and does not pay fee, will it not yet be necessary to take out summons to strike out jury notice?

By Sec. 37, a very important change is made in the law respecting attorneys and solicitors. The effect of the section is to abolish the old offences of maintenance and champerty.

By Sec. 39, imprisonment under the Debtors Act of 1869 is abolished save in following cases: (1) Default in case of a penalty not in respect of contract. (2) Summary proceedings before J. P. (3) Trustee ordered to pay money. (4) Default in payment of costs by attorney when ordered to pay on account of misconduct.

By Sec. 44, notice of application for new trial, etc., under Sec. 241 of County Courts Act 1887, can now be filed in ten days after service instead of six, as formerly. Provision is also made for summary disposition of such applications by the judge in chambers.

By Sec. 48, the omission of a Surrogate Judge to take security does not invalidate grant of letters of administration under 51 Vic., Cap. 29, Sec. 32.

CHAP. 3. By Sec. 1, the writ of *elegit* is abolished.

By Sec. 2, sheriff's sales of lands under writs issued prior to April 1st, 1890, are valid, matters in litigation excepted.

By Sec. 3, all sales hereafter to be made by sheriffs under last-mentioned writs shall be valid, if otherwise legal according to old practice of sales by sheriff.

By Sec. 5, a new section is substituted for Sec. 132 of Cap. 17, 48 Vic., the principal change being that instead of the words "a defendant in any suit, etc.," may obtain security, "any *party* to any suit, etc.," may now obtain the same from "from any other *party* thereto, etc."

By Sec. 8, secs. 177 and 184, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204 of Cap. 17, 48 Vic., are repealed; relating principally to French jurors in civil cases.

By Sec. 13, the sheriff shall not be obliged to receive any writ, unless the fees for receiving and returning such writ are paid.

By Sec. 14, the Imperial Act, 5 and 6 Wm. IV., Cap. 62, is repealed. The Imperial Act relates to statutory declarations, but the same ground is more than covered by the Affirmative Act. V. *post.*

By Sec. 16, the 58th section of Cap. 17, 48 Vic., is so amended as to allow the sheriff to interplead in a case of exemptions claimed.

By Sec. 17, the nets and seines of a judgment debtor are apparently no longer exempt.

CHAP. 5, amends Real Property Act of 1889. There are many important amendments in this Act, which space forbids detailing. We, however, notice the following:

By Sec. 11, when by any stipulation in mortgage, under new or old system, a notice must be given to mortgagor, and when mortgagor or his assigns, is or are dead, notice can be given to executor or administrator.

By Sec. 12, no application will be received to bring under new system an undivided interest unless application is also made for all other undivided interests in same land.

By Sec. 25, the District Registrar may in his discretion, notwithstanding any defect in proof or form of execution of any instrument presented for registration under the

new system, register the same. In all cases, unless dispensed with, there shall be annexed to every instrument dealing with land under new system, an affidavit or statutory declaration, or other evidence praying that the party so dealing with the land is of full age of 21 years.

By Sec. 27, no instrument shall be registered under new system, unless all lands affected by instrument be under operation of new system, and be in same land titles district, but certificates of judgment and attachment shall be registered under both systems.

By Sec. 29, any assignment, or mortgage of any such mortgage or encumbrance mentioned in Sec. 95 of R. P. Act 1889, may be made according to old forms, and registered under new system in same manner and effect as original mortgages was registered.

By Sec. 37, when an issue is directed between caveator and caveatee, "upon proper cause shewn judge or judge in chambers may direct that the issue be tried with the *caveatee* as plaintiff and the *caveator* as defendant," instead of the position being reversed as it formerly had to be.

By Sec. 38, provision is made for dismissing petitions against title for want of prosecution, or non-compliance with rules, etc.

By Sec. 41, affidavits, etc., must not be sworn before attorney, solicitor or agent of the parties, or before the partner, etc., of such attorney, etc.

By Sec. 43, a petition under a caveat may be lodged at any time before the issue of the certificate.

By Sec. 45, all actions against a District Registrar shall be brought against him by his name of office, and shall not abate by reason of any vacancy.

By Sec. 47, no District Registrar shall be *compelled* to attend out of his office for examination under any subpœna, but he may be examined under a Commission, or

otherwise, at his office. The object of this enactment is to prevent the Registrar being called away at a moment's notice; it is particularly aimed at the inconvenience of the outside District Registrars having to leave their offices suddenly for long periods, without sufficient notice, entailing suspension of business.

CHAP. 7 and 8, virtually consolidate the procedure relating to cancellation and amendment of plans of town and village sites.

CHAP. 9. In force 31st May. Further amends County Courts Act, 1887, and amendments. The amendment before noticed came into force on 31st March.

By Sec. 3, the enactment against clerks of the court acting as collecter of accounts, or conveyancing, or being in partnership with any one so acting, is made more stringent. The clerk, in addition to the fine, is also liable to dismissal from office. This legislation is much needed, the conduct of some of the county courts clerks has been very reprehensible in such matters.

By Sec. 5, writs for service *ex juris* may be served substitutionally.

By Sec. 6, in actions by infants a next friend may be dispensed with, if security be given for costs.

By Sec. 7, in case a promissory note or bill of exchange be lost, the plaintiff may in entering an action, give a statement setting out particulars of such note or bill, which statement shall contain an averment why the note or bill was not filed as was formerly required.

By Sec. 8, a garnishee order shall attach not only "all debts" but "all debts obligations and liabilities."

By Sec. 10, the time for putting in appeal book with Prothonotary is lengthened to 12 days; formerly it was six.

CHAP. 14, declares the English language only, to be the official language.

CHAP. 16, provides for a method for expediting the decision of constitutional and other Provincial questions, by reference of a case stated to the Court of Queen's Bench by the Lieutenant-Governor-in-Council. *Query*—Is this *ultra vires?*

CHAP. 17, entitled "The Married Woman's Real Estate Act," aims for allowing the fullest disposition by a married woman, over 21, of her real estate "as fully and effectually as she could do if she were a *femme sole*, and without any concurrence of her husband," or any examination or other formality.

Sec. 4, also provides that every deed, mortgage or conveyance made since 14th May, 1875, by married woman (no limitation as to age) shall be valid and effectual without any formality above mentioned. Not to affect matters in litigation or *res judicatæ.*

CHAP. 18. "The Affirmative Act," provides that every person shall be permitted to make his solemn affirmation, instead of taking oath, in all cases where oath is required, and such affirmation shall have force and effect of oath.

CHAP. 19, provides for the establishment of an official administrator, a wise and most judicious measure. Mr. George Patterson, barrister-at-law, of the City of Winnipeg, has been appointed to the office.

CHAP. 20, introduces "The Petty Trespass Act," of Ontario, providing for penalty not less than $1, not more than $10, with costs, for any such offence, irrespective of damages. The trespassing party may be apprehended, without warrant, by peace officer or owner, and taken before nearest J. P.

CHAP. 21, repeals, Sec. 11, of Cap 23, 50 Vic., which provided that, except where special damages were claimed for libel, actual malice or culpable negligence in publication, had to be proved. We are glad to see this very objectionable clause done away with.

This completes the review of the Statutes up to time of going to press. The considerate action of Mr. McLean, of the Attorney-General's Department, in issuing advance sheets of the Statutes from the printers' hands, has been much appreciated by the profession, and is a great convenience.

NOTES AND COMMENTS.

PRESS REPORTS OF CASES.

It is instructive, to say the least, to watch the current reports of cases tried which appear in the daily press. One would naturally think that here no discrimination would be shown, and that all persons before the court would be treated alike. This, to the discredit of the person furnishing the reports, is not the case, and a flagrant instance of partiality has lately came to our notice. An investigation *re* attorney, in a very notorious matter, was recently held by the Law Society. As a result, the Law Society issued a rule calling upon the attorney to answer certain questions. The rule was discharged, on counsel for the attorney taking the objection that the affidavits filed by the Law Society disclosed a criminal offence, in this instance, compounding a felony. Though other matters before the court at that time were duly noticed, it is significant that no report of this matter appeared in the newspapers. Why? Let those answer who know the true reason.

On the other hand, a convicted felon, one Haffield, incarcerated for manslaughter committed under peculiarly revolting circumstances, lately filed a bill against two members of the legal profession, Mr. Nugent and Mr. Jameson. Now these gentlemen are second to none in honour and integrity, and enjoy alike the confidence and respect of their fellow-practitioners. Yet in this case, when the matter came up for hearing on demurrer, a lengthy notice appeared in the daily press under displayed headlines, containing such extracts from the convict's bill as to lead the public to imagine that these gentlemen had

been guilty of nefarious practices. While the bar understands that allegations in a bill are often matters of form and inducement, and not seldom of a "fishing" tendency, a very contrary effect is produced on the mind of the public, who fail to discriminate between allegation and proof. In fact, the proceedings as reported, had such an unpleasant aspect, that the gentlemen referred to felt constrained to answer the notice the next day in a letter to the paper which had published the report. We are possessed of reliable information in this matter, and venture to predict, that when it shall have been thoroughly sifted Messrs. Nugent and Jameson will continue to occupy as high a position in the esteem of the public, and the profession, as they did at the time of the commencement of the action. Such a baneful notice was in this instance particularly ill-timed, for the untiring exertions of the slandered gentlemen on behalf of the unfortunate criminal, in one of the most sensational trials ever held in Manitoba, are yet fresh in the public mind, and will not soon be forgotten.

Is it not a monstrous thing that men of such character and standing should be thus pilloried before the public by a newspaper in displayed capitals, when disreputable practitioners are allowed to depart without even a warning being given to the community to be on its guard against them? What sort of justice is this? We have no toleration for the noxious policy of keeping the names of erring attorneys from the public. The only effect of this is to make honest men bear a portion of the opprobrium which such scandals bring upon the profession. We do not say that names, in general, should be published before the charges are proved, or the attorney refuses to answer them. Then let the matter be given every publicity.

In this connection it will not be out of place to review the reports of three *re* attorney matters in the present

volume of the *Manitoba Reports*. They are, *re* J. B., p. 19; *re* McPhillps, p. 108; *re* A., p. 181. Let us investigate these cases. J. B. was struck off the rolls for a very serious offence. A. was ordered to deliver a bill showing how he had spent his client's money, which he had refused to do. In both these grave matters all is secresy; the attorney's name is withheld. Contrast this Star Chamber method of reporting with that adopted in the case of Mr. McPhillips, whose name is given in full. Logically, we would infer from the publicity given his name, that he must have seriously misconducted himself, to be thus blazoned forth to the profession. Not so. Mr. McPhillips had been called upon to answer a rule charging him with having broken his professional undertaking, and his actions were justified by the court. Why then publish his name, when the names of the erring ones were suppressed? Yes, why indeed? What reason, what sense, is there in further prolonging this farce, which ought no longer to be endured?

Truly Mr. Justice Falconbridge spoke well and to the point, when he said lately, in *re Hands* v. *The Law Society of Upper Canada*, that "there is a prevailing impression "amongst the laity that there is no arm, either of the "court or of the Law Society, strong enough to save the "honour of the profession of the law, or long enough to "reach an unworthy practitioner of it." It is indeed time to eradicate this impression, so humiliating to the bar. Shall we further countenance the ransacking of "musty, fusty, worn-out rules" of law to shield dishonesty? If the arm of the Law Society be not strong enough, then strengthen it. If the courts have not the jurisdiction, then confer it. Let the necessary legislation be passed for the attainment of this object, and that as speedily as possible. It ought to, and could have been obtained long ago.

THE LAW SOCIETY'S LIBRARY.

This library is notoriously incomplete. To give a few glaring instances, we may mention that not even a full set of the Manitoba Statutes is in the library, and the same may be said of the *Manitoba Gazette.* The index volume of *Burn's Justice of the Peace*, has been lost and never replaced, many of the text books are out of date and others, not in the library, are much needed. We say nothing as to various reports urgently required for the use of the profession. This is all the more reprehensible when we consider the very large sum lying to the credit of the Society in the Imperial Bank. While all admit the above state of facts, practically nothing has been done to remedy it. Why is this? Let the report of the three benchers on the question of Court House accomodation furnish the answer. This report says: "*nearly every inch of available space in the library is now taken up. The library cannot be substantially increased till more space is provided.*" We fancy our readers will stare at this astounding assertion, yet it appears to have been made in sober earnest. It is none the less a misrepresentation, which we are forced to believe to have been unintentional, yet if all the clauses of the report of the committee on the Court House question are not more weighty than this one, it is no wonder that they have little or no effect on the opinions of the Bar. No reliance can be placed on this particular effusion, for the irrefutable answer to the report is contained in the application of a foot rule to the bare walls of the library. By merely shelving up these bare spaces, accomodation could be found for at least 1500 volumes. With no new shelving at all, and by simply using the unfilled spaces in the present book-cases, 200 volumes could be added. By a sensible and easy re-arrangement of the present book-cases and shelving, the accomodation could be increased to an astonishing extent, as we shall proceed to show by no mean authority. But first as to the number of books, and the size of the library.

On the 27th of March, 1889, we are informed, the number of volumes was 3,811. This number is still well under 4000. The dimensions of the library are 60 x 20 feet generally speaking, but considerably over 20 feet wide near the east end. Now how many books should such a large room hold? We have the opinion of no less an authority than Mr. Gladstone on this subject. Writing in the *Nineteenth Century* for March, in a notable article on "Books and the Housing of Them" he says:

"I take as before a room of *forty* feet in length and *twenty* in "breadth, thoroughly lighted by *four windows on each side*; as high as "you please, but with only about nine feet of height taken up for the "book-cases; * * * and there is no gallery. In the manner I have "described there may be placed on the floor of such a room, without "converting it from a room into a warehouse, book-cases capable of "receiving in *round numbers 20,000 volumes.*"

Now, having made as great an allowance as the imagination will permit, for any difference in the size of law books, for table room, or any other cause, how it is possible to reconcile the committee's report with the careful estimate of Mr. Gladstone? While he finds ample accomodation for 20,000 books in a room 60x20 feet, it is too much to ask us to believe that "nearly every inch of available space" is taken up in a library more than one-third greater, by a paltry collection of less than 4000 volumes. It is but too evident that the committee should at once read Mr. Gladstone's article—and make another report.†

LICENSED AND UNLICENSED CONVEYANCERS.

The introduction of an act in the last session of the Manitoba Legislature, for regulating and securing the efficiency of these gentry, was the signal for the customary outburst of ignorant prejudice against the legal profession,

† If Mr. Gladstone's figures require corroboration, it will be found in the letter of a correspondent of *The Athenæum* for March 29th. He maintains that the number is underestimated, and places it at 22,000. *Notes and Queries* for March 8th, pronounces Mr. Gladstone's plan "feasible and well worthy of attention."

on the part of certain of our "gifted" legislators. This amusing exhibition of narrow-mindedness invariably comes to the surface, whenever the gentlemen of the long robe endeavour to obtain legislation on matters relating to the profession. The knowing and sapient backwoodsman, imagining that he perceives the fell design of the astute lawyer, craftily proceeds forthwith to oppose the measure "on general principles," and unconsciously plays into the hand of his dearest foe, the irresponsible conveyancer. As a matter of dollars and cents, the conveyancer, popularly so called, whether licensed or unlicensed, with his *confreres*, the municipal clerk, the country school-master, *et al.*, are the lawyers' best friends. By their superficial knowledge and careless work, they engender more law-suits than all other classes of persons. The reason that solicitors object to these classes is, because they have to bear all the odium and hard feeling, caused by such errors. This is manifestly unjust, but unfortunately the rural litigant cannot be brought to distinguish between the duly qualified solicitor, and the shark who unlawfully gobbles his money. With a sublime indifference to degree or class, he simply calls them all "lawyers," and blames the whole profession for mistakes for which they are no way responsible. The niggardly citizen, who, from parsimonious motives, employs an irresponsible cheap-jack, richly merits the occasional law-suit which he gets with the cheap and carelessly drawn document. Had he employed a reputable practitioner, and had a mistake by chance occurred, the client would have recourse against the solicitor, who would only be too glad to rectify any error, to save his professional reputation. The remarks of many of the M. P. P.'s on the before-mentioned bill, are really impressive, because of the vast amount of ignorance of the subject disclosed, and the lavish disregard of sense they displayed. We may say here, *en passant*, that we would like to have seen a little more *esprit de corps* mani-

fested on the part of a prominent Q. C., bencher and M. P. P., who was present when his profession was virulently attacked.

Of the opponents of the bill, none distinguished themselves so much as did the fire-cracker member for Morris, who quite bore off the palm for anserous loquacity. Waxing virtuously indignant at this monstrous attempt of the lawyers to restrain unlawful practitioners, he fairly "slopped over," and is reported to have delivered himself as follows: "That a man with the least grain of brains would learn conveyancing in six months, and all the better if not with a lawyer."

It is very edifying to see the disinterested stand taken by Mr. A. F. Martin. But is it quite disinterested? Let us see. There is on the files of the Court of Queen's Bench for Manitoba, the recent examination of a certain witness in the case of *Tetu* v. *Baril*. The sworn testimony of this man shows, that one A. F. Martin drew a deed purporting to convey a certain property, in which deed, however, occurred a fatal error, by which the wrong farm was conveyed to the purchaser, and thereupon and therefrom arose the costly litigation in the action. This Martin unlawfully charged an ignorant countryman the sum of $2.00 for drawing the deed. So far as can be seen, he made no charge for the law-suit which he likewise bestowed upon the illiterate and unhappy granger. This certainly was magnanimous and deserves all praise. Now can it be possible that the noisy legislator is the same A. F. Martin who drew the deed, and made the unlawful charge? When we consider the exceptional intellectual attainments of the member, and to use his words, the glaring want of even "the least grain of brains" in the would-be conveyancer, we recoil from this supposition. Neither can we forget that A. F. Martin the member, must be of course, like Brutus, "an honourable man," while it is only apparent

that the drawer of the deed doth sadly resemble Cassius, in that, like him, he hath "an itching palm."

But facts are stubborn things, and if there be any virtue in an oath, these "Dr. Jekyll and Mr. Hyde" proceedings of the member should be subjected to the light of day, for truly this legislative "Daniel come to judgment," is not embarrased by those scruples which troubled Brutus, who declared :

> "By heaven, I had rather coin my heart,
> "And drop my blood for drachmas than to wring
> "From the hard hands of peasants their vile trash
> "By any indirection ; * * * * *

CRITICISM OF THE BENCH.

Under the suggestive title of "A Rule-making Cadi," the *Solicitor's Journal* for March 1, 1890, vigorously attacks no less a personage than the Lord Chancellor of England. It charges him with seeking to extend his authority in an equivocal manner, under certain acts, by means of objectionable rules. It further states that while the Lord Chancellor was Sir Hardinge Gifford, Q,C., M.P., he entered an emphatic protest against "this silent and secret mode of altering the law," but now, "since he took his seat on the woolsack" he has "devoted every effort to extend and develop the practice to which, before his elevation, he had so strong an objection." However much we may have felt tempted to disregard the frequent charges brought against Lord Halsbury by certain journals, and *Truth* in particular,—which latter went so far as to accuse him of flagrant and persistent jobbery in his high office,—yet we cannot overlook such expressions as the above, made by a legal journal which would undoubtedly well assure itself of just grounds before making grave allegations like these. We in Canada are, in general, of the opinion that the press and the public of Great Britain look upon the judiciary with peculiar respect. and are exceedingly averse

to making strictures upon its actions. That a journal, occupying the position of the one we quote from, should feel called upon to draw the attention of the public to the proceedings of one of the highest state functionaries and the head of the legal profession, seems at first glance to savour of temerity, especially when we consider the reluctance displayed, even in Canada, to criticize the actions of the Bench. This reluctance, however, to fairly and honestly criticize for the public good, the proceedings of our judges, is fast disappearing and its total disappearance will be productive of nothing but good results. That legal journal, which, while professing to be actuated by motives for the common weal, would hesitate to denounce the wrongful, arbitrary, or injudicious acts of any judge, no matter how high his station, would richly merit the disdain and contempt of every high-minded member of the Bar.

FLOTSAM AND JETSAM.

TWO CURIOUS TRIALS.

The recent publication, by Mr. George Neilson, of a most interesting work under the above title, recalls to mind the circumstances of the last resort to this now happily obsolete tribunal, which nevertheless lingered to a comparatively recent date. Reference to the *New Newgate Calendar*, vol. ii, p. 19, shows one Abraham Thornton to be the man, who demanded for the last time in England, the extraordinary privilege of wager of battle. He had been tried for the murder of Mary Ashford, described as a "lovely and interesting girl," who had been done to death on the 26th of May, 1817, in a manner attended by circumstances of peculiar atrocity. Though the jury returned

a verdict of not guilty, yet owing to the popular impression that a miscarriage of justice had taken place, Thornton was again taken into custody "on an appeal of murder to be prosecuted by William Ashford, the brother and heir-at-law of the deceased." On the 17th of November, 1817, in Westminster Hall, before Lord Ellenborough, the prisoner demanded trial by "wager of battle." On the 16th of April, 1818, after a lengthy argument, the court gave judgment to the effect that "the law must be administered as it stood, and that therefore the prisoner was entitled to claim trial by battle," but with this proviso, that the trial be granted only "in case the appellant (William Ashford) should show cause why the defendant should not depart without day." The argument was resumed on the 20th by the appellant's counsel, but the prisoner was discharged without bail. This glaring instance of evasion of justice demanded amendment of the law, and the Stat. 59 Geo. III, Cap. 46, abolished the trial and the plea as well.

Mr. Neilson gives a most curious account of the last approvers trial, which occurred in 1456. In those days any malefactor who turned approver, had to justify in his own body the truth of the charges preferred by him against his accomplices, or whoever he accused. In the case given below the conditions of the "battle" were enough to have daunted the unfortunate accused, quite irrespective of the fear of losing his life at the hands of the approver.

We take the account from the *Athenæum* of March 8th, 1890 :—

"Withorn, a thief, was imprisoned at Winchester. To save his life "he made a series of appeals against honest men, some of whom were "hanged. He received three half-pence a day, from the King, a salary "which he drew for nearly three years whilst still in gaol, as a general "approver. At last he falsely charged James Fisher, who challenged "him to combat. The judge, according to Lord Mayor Gregory's ac- "count printed by the Camden Society, laid down remarkable condi- "tions. If Whithorn prevailed, he would go back to prison, but have

"better fare than before, being allowed two-pence per day. The com-
"batants were to be clad all over in white sheeps leather, and to be
"armed with a staff of green ash, three feet long, provided at one end
"with a sharp horn of iron. If Fisher prevailed to the extent of killing
"Withorn, he was to be hanged for manslaying 'by soo moche that
"he hathe slayne the Kyngys prover.' When the combat began the de-
"fendant broke his staff at the first blow, but the officers took away the
"approvers weapon after he had struck one return blow. Then ensued
"a sickening contest, sickeningly described—too much, we should
"think, even for the taste of the Pelican Club. The men fought with
"their fists and rested, and then fought and rested again. Then 'they
"*wente togedyr* by the neckys,' and with their teeth tore each other's
"leathern coats and the flesh beneath. The end seemed to have come
"when Withorn cast Fisher on the ground; but in the deadly wrestle,
"more by hap than strength 'that innocent recoveryd up on his kneys,
"and toke that fals peler (appealer) by the nose weth hys tethe, and put
"hys thombe in his yee, that the peler cryde owte and prayde hym of
"marcy, for he was fals unto God and unto hym.' This ended the duel,
"and the judge pronounced sentence upon the approver, whose fate is
"thus piously recorded—an thenn he was confessyd and hangyd, of
"whos soule God have marcy. Amen."

BLACK LETTER LAWYER.

According to Mr. B. Whitehead, of Lincoln's Inn, *Notes and Queries*, January 18, 1890, this term has a more limited significance than we are accustomed to accord it in Canada. He says that, "A black-letter lawyer is "simply one who is learned in the old reports and statutes "of the period when printing was in black letter; but as "these authorities are more useful in real property and "equity than in any other branches of the law, the term is "generally applied to learned conveyancing barristers. "This ancient learning is now becoming rapidly valueless, "or rather of only antiquarian value."

TRIAL OF WARREN HASTINGS.

Mr. Daniel Hipwell, writing to *Notes and Queries*, February 15, 1890, says, that among a miscellaneous lot of books and autograph letters sold recently in London, was the following original warrant for the holding of the trial of Warren Hastings:

"George R., Our Will and Pleasure is that you cause A Court to be erected in Westminster Hall for the trial of Warren Hastings, Esq., to be made and furnished according as hath seen accustomed upon the like occasions, And for so doing this shall be your Warrant. Given at our Court at St. Jame's, the twenty-fourth day of December, 1787, in the twenty-eighth year of our Reign. By His Majesty's command.

SYDNEY.

"To our trusty and well-beloved Sir Peter Burrell, Knight, Deputy Great Chamberlain of England."

Recorder Adam Thom.

The 21st day of February, A.D. 1890, is a date of exceptional significance, in the legal history of Western Canada. On that day, at the advanced age of eighty-seven, in Torrington Square, London, died Adam Thom, LL.D., the first recorder of Rupert's Land, and the father of the Bench and Bar of Western Canada. He was born in Aberdeen, and there educated at Kings College, whence he graduated M.A. in 1820. About the year 1832, he emigrated to Canada, and in 1833 established and was first editor of the *Settler*. He was subsequently editor of the Montreal *Herald* in 1836–38, read law in Montreal with Mr. James Charles Grant, and was called to the bar of Lower Canada in 1837. The celebrated report of the Earl of Durham, on the state of British North America was drawn up by Mr. Charles Buller, with the assistance of Mr. Thom; in fact according to the *Law Times* of March 1, 1890, Mr. Thom was considered to be the chief author of the report. Under the *nom de plume* of "Camillus," he wrote the memorable "Anti-Gallic Letters," addressed to the Earl of Gosford, Governor-in-Chief of the Canadas.

Some few years after the establishment of the "Governor and Council of Assiniboia," it became apparent to the Hudson Bay Company, that judicial procedure should be

instituted in Rupert's Land, on a more substantial basis, and in a more efficient manner, than had been the case in the past. Accordingly the General Quarterly Courts were formally established in 1839, and Mr. Thom arrived in the spring of that year at Red River, and entered upon his duties as Recorder of Rupert's Eand, with a salary attached to the office of £700 per annum. In addition to the Recordership, he was the legal adviser to the Governor of Assiniboia, who was instructed to be guided by Mr. Thom's advice in matters of law. He was also senior member of the Governor's Council, and as such, virtually presided at the general court. The difficulties of his position were many, and of no trifling nature. The settlers persisted, and perhaps they may be excused in doing so, in looking upon him, as not only the Recorder, but the paid servant of the Hudson's Bay Company, and while none ventured to impeach his uprightness and integrity, yet they maintained that, be he never so impartial, his interest being inseparable from that of the company, he could not be completely unbiased in his holdings. Be this as it may, there can be no doubt, that he conscientiously discharged his duties, in a manner that could scarcely be more satisfactory under the existing circumstances, which required no little degree of tact. Events progressed with as little friction as could be expected, till the famous trial of Guillaume Sayer, who in 1849 was charged with trading furs with the Indians. The display of armed force by the French half-breeds during the trial, and the demonstration which took place after it, brought matters to such a crisis that in order to avoid a collision Mr. Thom retired from the bench till some time in 1850. For a space of about a year justice was administered by Major Caldwell, the Governor of Assiniboia. A very complicated case of great importance —*Foss* v. *Pelly*—having arisen, Mr. Thom again resumed his office for the purposes of the trial. The Governor,

however, disagreeing with Mr. Thom on his finding, probably because he would not find as the Governor wanted, managed either to secure his permanent removal or to force him to resign. He then, till 1854—about four years—acted as the clerk of the court over which he had formerly presided, and with the same salary. In the beginning of September of that year, he left Red River with his wife and two sons and returned to Scotland, sailing from York Factory on the 18th of October by H. B. ship *Prince of Wales.** In 1856 he received the honorary degree of LL. D., from his old university. His busy life did not prevent his retainining interest in his former literary career, or from pursuing his studies, for in 1848 he published a work entitled *The Chronology of Prophecy.* He was appointed one of the first six Hon. Fellows of St. John's College, Manitoba. It will not be out of place to make a few extracts from contemporary writers and travellers in regard to him. Major J. Wesley Bond† who visited Red River, speaks of him as "a very leading man," who was "very active, energetic, and possessed of considerable talent." Bishop Mountain‡ found him "an exceedingly able man, possessing a varied range of information and deeply engaged, latterly, in biblical studies." Alex. Ross,†† who considered the appointment of a recorder rather in the light of a mistake, and was sometimes opposed to Mr. Thom, yet states that he was "a gentleman of talent, and high attainment in his profession." The Rev. John Ryerson says that he was "a gentleman of learning and superior ability in the legal profession." §

---

* Hargrave's *Red River*, p. 90. Ryerson's *Hudson Bay*, pp. 62, 106 *et seq.* The year of his departure is incorrectly given as 1855 in the *Law Times* of date cited.

†*Minnesota and Its Resources.* *V.* appendix *Camp Fire Sketches.*

‡*Journal of the Bishop of Montreal*, p. 82.

†† *Red River Settlement*, p. 224.

§ *Hudson Bay*, p. 63.

Hargrave* thus feelingly refers to him: "I cannot close this cursory glance at the official career of the pioneer of the law in the Red River settlement without stating that at the close of his long and often unquiet sojourn of fifteen years in this singularly situated place, he left behind him the reputation of great ability, and of kindly hospitality in his private relations among those of his acquaintances best able to appreciate the former, and who had shared in the latter." Mr. Thom is principally known to the legal profession, by his careful and elaborate judgment on the jurisdiction and powers of the Hudson Bay Company, delivered in the celebrated case of James Calder, on the 17th August, 1848, contained in one of the old record books of the Quarterly Court. This judgment is of much value, and is entitled to more weighty consideration than it has so far received; doubtless the fact of its never having been printed is mainly responsible for this. Quite irrespective of the merits of Mr. Thom, an especial interest attaches to him because of his having been the first lawyer in Rupert's Land, and the unique position he occupied. A halo of romance is thrown round his name, when we pause to think of the vast extent of his jurisdiction, and the wild and peculiar people over whom that jurisdic- was exercised, and that to the extent of capital punishment. How wonderful the change since then! Mr. Thom had been for so many years a stranger to this country, that his name was but rarely mentioned, even in legal circles, and most of those who thought of him, regarded him as no longer among the living. None the less is he entitled to a prominent place in the early history of Rupert's Land, whose best interests he faithfully strove to serve. The members of the bar of Western Canada may congratulate themselves that they have Mr. Thom as their precursor; and it is no disparagement to the Bench to say,

Red River, p. 90.

that his life will bear favourable comparison with any Judge who has succeeded him.*

CORRESPONDENCE.

THE EDITORSHIP OF THE MANITOBA LAW REPORTS.

To the Editor of the Western Law Times:

SIR,—As a member of the bar I naturally feel a delicacy in alluding to this subject. I think, however, that the conduct—there is not much *editing*—of the law reporting, should be given to one of the junior bar, following the practice adopted in Ontario and elsewhere. True, the editor in Ontario is a Q. C. There however, the large staff of reporters, the great amount of work done, and the necessity of having some one in authority to insure uniformity and regularity among the many reporters may be a sufficient reason for the office. It is no answer to an objection taken to the system in force here. While the salary of the present reporter (for such he is practically) is not large, yet it would be a great inducement, and a most substantial assistance to a young and struggling member of the profession. It does not appear seemly that a Q. C., a leader of the bar in very large practice, should retain this position with the, to him, small additional income it affords. I do not in the least wish to disparage the present editor. It is evident however, that there are many young members of our profession equally competent for that position. I hope that the benchers at the earliest opportunity will make a change which, I am sure, will not only meet with the

* We would be glad to have any opportunity of inspecting any letters or documents relating to Mr. Thom. We would like to know if there be any portrait of him in existence.

hearty approval of the bar at large, but would be a great aid to some "briefless barrister," anxious to succeed in his profession. Of one thing we may all be quite certain, the bulk and regularity of issue of the Law Reports will not suffer by the change.

Hoping you will give this space in your next issue, and wishing you every success in your new venture.

Yours very truly,

BARRISTER.

Winnipeg, April 20, 1890.

TO A CORRESPONDENT.

We received the large placard you forwarded us containing the advertisement of "the Kirchoffer Bros.," announcing "law offices" at Brandon and Souris. In reply to your query as to whether "the Kirchoffer Bros. are solicitors entitled to practice in Manitoba," we would say that Mr. J. N. Kirchoffer is; Mr. R. B. Kirchoffer is not. We shall, on another occasion, more fully notice this very unprofessional and sensational method of advertising.—[ED. W. L. T.]

THE

WESTERN LAW TIMES.

VOL. I. JUNE, 1890. No. 3.

The Rise of Law in Rupert's Land.

In order to obtain an intelligent idea of the circumstances relating to the granting of the Hudson's Bay Company's Charter, fraught as it was, with such grave consequences to Canada, it is necessary to glance briefly at the events which led up to it. The history of the plantation of Rupert's Land practically begins with the discovery of Hudson's Bay in 1610, by the daring navigator of that name, who first ploughed the waters of the Bay, in his little ship, the *Discoverie*, of only 70 tons. His appalling death the following year in the icy waters of that inland sea, did not deter the intrepid mariners, who succeeded him, from further prosecuting his great discoveries in those northern reigons "at the Mention of which," says Oldmixon, "the reader will almost freeze as the Writer does; for that country is so prodigiously cold, that Nature is never impregnated by the sun; or rather her barren Womb produces nothing for the subsistence of man." (1) The voyages of Captain Sir Thomas Button in 1611, of Bylot and Baffin, in 1615, and of Luke Fox and Thomas James in 1631, added very considerably to the knowledge of these seas, (1) but it is not till we come to the voyages of

(1) Oldmixon's British Empire, Vol. II, p. 543; 1741.

(2) Robson, Account of Hudson's Bay, 1752 p. 4, of appendix I.

Des Grosseiliers and Radisson, that any definite record of the erection of permanent buildings on the shores of the bay, is afforded. The pretensions to explorations and acquisitions in these latitudes based on the voyages of the Sieur Jean Bourdon, the attorney-general of Quebec in 1656; on that of the Jesuit Father Dablon in 1661, by order of the Sieur d'Argenson, governor of Canada; on that of the Sieur Coûture, seneschal of the Côte de Beaupre in 1663, by order of the Sieur d'Avagour, governor of Canada, and on that of the Sieur Duquet, the king's attorney to the *Prévôte* of Quebec, and the Canadian, Jean L'Anglois, in the same year, are not entitled to the weightiest consideration, when, so far back as the 8th Nov. 1686, we find that the Marquis de Denonville, governor of Canada, admitted in a letter of that date to the Marquis de Seignelay, referring to a memoir of the Sieur de Callières, governor of Montreal and Lieut.-General of Canada, in regard to the above mentioned voyages and rights thereunder, (3) that "while our registers ought to be full" of these rights "yet no memorials of them are to be found." When, however, we investigate the voyages of Peter, or Pierre, Esprit Radisson and Médard Chouart, Sieur des Groseilliers, brother-in-law of Radisson, we can proceed with certainty, the original manuscripts of their voyages being preserved in the Bodleian Library, and the British Museum. Radisson emigrated to Canada from St. Malo in France on the 24th day of May 1651. Both he and Des Groseilliers, who came to Canada from Charly St. Cyr, France, in 1641, at the age of sixteen years, traded largely and successfully (4) in

---

relates, "that the whole Strait, Bay and Labrador Coast were discovered by the English without any competitors, except Munck, who was sent by the King of Denmark in 1619, when he wintered in Churchill, or Seal-river; but I rather think in Churchill-river, a brass gun being taken up there, some years after Hudson and Button had discovered the Strait and Bay,"

(3) N. Y. Hist. Doc., Vol. IX, p. 297.

(4) Radisson's Voyages, Boston, 1885. Oldmixon, Vol. II, p. 548, ed. 1708, p. 544, ed. 1741.

furs with the Indians and in the prosecution of this pursuit made lengthy and arduous excursions into the interior, in the course of which, between 1661 and 1664, they penetrated as far as Lake Assiniboin, otherwise the Lake of the Assimpouals, now known as Lake Winnipeg, and "meeting with some Savages . . . . . they learned of them that they might go by land to bottom of the Bay, (Hudson's), where the English had not yet been, upon which they desired them to conduct them thither, and the savages accordingly did it. The two Frenchmen returned to the upper lake the same way they came, and thence to Quebec, the capital of Canada, where they offered the principal Merchants to carry ships toHudson's Bay, but their Project was rejected . . . . . " (5) These dauntless traders were the first to penetrate into a part of what is now Manitoba, preceeding the gallant La Verandrye by about seventy years. After the refusal of their advances by the Montreal traders, they went to France in hopes of a more favorable hearing at court, but after presenting several memorials and spending a great deal of time and money they were answered as they had been at Quebec, and their project looked upon as chimerical. (6) They returned to Canada and made in 166$\frac{4}{5}$ an unrenumerative voyage to Hudson's Straits from Boston, and being discouraged by reason of a law suit which arose out of one of the ships being lost, they, by the advice of the king's commissioner, then in New England, decided to go to England and offer themselves to the king, which they did in 1664, sailing from Nantucket on Aug. 1st of that year. After considerable delays their plans were carried into execution. "To Des Groseilliers and Radisson must be given the credit of originating the idea of forming a settlement at Hudson's Bay, out of which grew the profitable organization of the

(5) Ibid.

(6) Oldmixon, ibid.

"better fare than before, being allowed two-pence per day. The com-
"batants were to be clad all over in white sheeps leather, and to be
"armed with a staff of green ash, three feet long, provided at one end
"with a sharp horn of iron. If Fisher prevailed to the extent of killing
"Withorn, he was to be hanged for manslaying 'by soo moche that
"he hathe slayne the Kyngys prover.' When the combat began the de-
"fendant broke his staff at the first blow, but the officers took away the
"approvers weapon after he had struck one return blow. Then ensued
"a sickening contest, sickeningly described—too much, we should
"think, even for the taste of the Pelican Club. The men fought with
"their fists and rested, and then fought and rested again. Then 'they
"*wente togedyr* by the neckys,' and with their teeth tore each other's
"leathern coats and the flesh beneath. The end seemed to have come
"when Withorn cast Fisher on the ground; but in the deadly wrestle,
"more by hap than strength 'that innocent recoveryd up on his kneys,
"and toke that fals peler (appealer) by the nose weth hys tethe, and put
"hys thombe in his yee, that the peler cryde owte and prayde hym of
"marcy, for he was fals unto God and unto hym.' This ended the duel,
"and the judge pronounced sentence upon the approver, whose fate is
"thus piously recorded—an thenn he was confessyd and hangyd, of
"whos soule God have marcy. Amen."

BLACK LETTER LAWYER.

According to Mr. B. Whitehead, of Lincoln's Inn, *Notes and Queries*, January 18, 1890, this term has a more limited significance than we are accustomed to accord it in Canada. He says that, "A black-letter lawyer is "simply one who is learned in the old reports and statutes "of the period when printing was in black letter; but as "these authorities are more useful in real property and "equity than in any other branches of the law, the term is "generally applied to learned conveyancing barristers. "This ancient learning is now becoming rapidly valueless, "or rather of only antiquarian value."

TRIAL OF WARREN HASTINGS.

Mr. Daniel Hipwell, writing to *Notes and Queries*, February 15, 1890, says, that among a miscellaneous lot of books and autograph letters sold recently in London, was the following original warrant for the holding of the trial of Warren Hastings:

"George R., Our Will and Pleasure is that you cause A Court to be erected in Westminster Hall for the trial of Warren Hastings, Esq., to be made and furnished according as hath seen accustomed upon the like occasions, And for so doing this shall be your Warrant. Given at our Court at St. Jame's, the twenty-fourth day of December, 1787, in the twenty-eighth year of our Reign. By His Majesty's command.

SYDNEY.

"To our trusty and well-beloved Sir Peter Burrell, Knight, Deputy Great Chamberlain of England."

Recorder Adam Thom.

The 21st day of February, A.D. 1890, is a date of exceptional significance, in the legal history of Western Canada. On that day, at the advanced age of eighty-seven, in Torrington Square, London, died Adam Thom, LL.D., the first recorder of Rupert's Land, and the father of the Bench and Bar of Western Canada. He was born in Aberdeen, and there educated at Kings College, whence he graduated M.A. in 1820. About the year 1832, he emigrated to Canada, and in 1833 established and was first editor of the *Settler*. He was subsequently editor of the Montreal *Herald* in 1836–38, read law in Montreal with Mr. James Charles Grant, and was called to the bar of Lower Canada in 1837. The celebrated report of the Earl of Durham, on the state of British North America was drawn up by Mr. Charles Buller, with the assistance of Mr. Thom; in fact according to the *Law Times* of March 1, 1890, Mr. Thom was considered to be the chief author of the report. Under the *nom de plume* of "Camillus," he wrote the memorable "Anti-Gallic Letters," addressed to the Earl of Gosford, Governor-in-Chief of the Canadas.

Some few years after the establishment of the "Governor and Council of Assiniboia," it became apparent to the Hudson Bay Company, that judicial procedure should be

said governor, etc.," to make, ordain and constitute such and as many reasonable laws, constitutions, orders and ordinances, as to them . . . . shall seem necessary and convenient for the good Government of the said company, and of all Governors of colonies, forts and plantations, factors, masters, mariners and other officers employed, etc., . . . in any of the territories and lands aforesaid . . . : All and singular, which laws, etc., We will to be duly observed and kept under the pains, etc., or always as the said laws, etc., be reasonable and not contrary or repugnant, but as near as may be agreeable to the Laws, Statutes or Customs of this, Our Realm." It will be noticed that in the above sections the power of the company to make laws, etc., is limited to be "for the good Government of the said company, and of all governors of colonies, forts, etc., factors, masters, mariners, etc.," and the objection has been well taken that the general inhabitants of Rupert's Land, would not come within the scope of charter. But, "as if," says Chief Justice, Sir F. G. Johnson, formerly Recorder of Rupert's Land, (12) "in contemplation of a future when, "as a natural consequence of the establishment of forts and "factories, and the employment of numerous officers and "servants, settlements should come to be formed as well as "persons, who had ceased to be in their service, as of their "descendants and others, powers to legislate and to ad-"minister justice, civil and criminal as regards all other per-"sons living within the territories, are expressly conferred in "the following lines : (13) The governor and the council, "of the several and respective places where the said com-"pany shall have plantations, forts, factories, colonies, "or places of trade, within any, the countries, lands or "territories hereby granted, may have power to judge all

(12) Report of the C. J., acting as Special Commissioner, to investigate and report on the state of the laws of Manitoba. Boundary Report, 1880, p. 101 et seq.

(13) Charter, H. B. Co.

"persons belonging to the said governor and company, "*or that shall live under them*, in all causes, whether civil "or criminal, *according to the laws of this kingdom, and to* "*execute justice accordingly* ; and in case any crime or mis-"demeanour shall be committed in any of the said com-"pany's plantations, forts, factories or places of trade, "within the limits aforesaid, where judicature cannot be "executed for want of a governor and council there, then "in such case it shall and may be lawful for the Chief Factor "of that place, and his council to transmit the party togeth-"er with the offence, to such other plantation, factory or "fort, where there shall be a governor and council, where "justice may be executed or into the kingdom of England, "as shall be thought most convenient, there to receive "such punishment as the nature of his offence shall de-"serve." The consideration of the state of the law in Rupert's Land under the above charter resolves itself into the following heads :

1. Were the grants of the soil of and privileges in Rupert's Land to the company, valid ?

2. What was the area and extent of the plantation of Rupert's Land ?

3. What laws were introduced therein by the above provisions of the charter ?

Were the grants of the soil of, and privileges in Rupert's Land to the Company valid, under the charter? The question as to whether King Charles had the right to grant the exclusive trade of the colony, to the Hudson's Bay Company does not come within the scope of this article. We may say, however, that the weight of authority is opposed to the validity of this claim, which in reality received its death blow in Rupert's Land on the conclusion of the case of the Company against *Guillaume Sayer* tried at Fort Garry in 1849 (14). The rights of the Company

(14) Records of Quarterly Court, Government library, Winnipeg.

to the soil however, is supported by the preponderance of authority in favour of the claim, which we can do no more than merely glance at (15).

It will be remembered that the Charter granted to the Company "all the lands and territories upon the countries "coasts and confines of the seas, bays, lakes, rivers, creeks "and rounds," in whatsoever latitude, that lie with the "entrance of Hudson's Straights, that are not actually "possessed by the subjects of any other Christian Prince "or State, etc."

As a matter of fact there is no satisfactory proof that the French, or others, were in possession of any of the territories above mentioned. They did not reach the bay and attempt to take possession by formal acts until the expedition of the Jesuit Father Charles Albanel and the young Canadian Sieur de St. Simon, till the 9th of July, 1672, when they planted the cross, set up the arms of France, and took possession in the King's name. This however, was not till over two years after the granting of the Hudson's Bay charter. In fact, to use the words of Mr. Justice Armour "there was no land there [in Rupert's "Land], at that time, occupied by any other Christian "Prince" (16). It is true the Company did not, for very many years, penetrate into the interior, unless we except the journal of the voyage of Henry Kelsey (17) in 1691, which has been commented upon at length by Robson (18). The journey of Joseph La France in 1739-40, from Sault St. Marie to York Fort (19), shows that the Company was not at all unfamiliar with the interior. This La France

(15) For the arguments *pro.* and *con.*, fully set out, v. R. U. Marten's Hudson's Bay Territories, London, 1849; and J. E. Fitzgerald's Hudson's Bay Company, London, same date, and the Parliamentary Reports of 1749, 1829. 1842, 1857, etc.

(16) Boundary Reports, 1880, p. 133..

(17) Report on H. B. Co., 1748, pp. 276, et seq.

(18) Robson's Hudson Bay, p p. 23, et seq.

(19) Dobb's Account of Hudson's Bay, pp. 29. et seq., Lond., 1744.

was the first to reach the Company's posts on the Bay, through Lake Winnipeg and Nelson River. They had, however, established Brunswick House, some considerable distance up the Moose River, in 1730; Henly House, about 1744, between 156 and 200 miles up the Albany River; and some time after 1740, a fort on Split Lake, or Lake of the Forts, an extension of the Nelson River, and later, Samuel Hearne, erected for them in 1774, Cumberland House, on Sturgeon Lake, an expansion of the Saskatchewan. La Verandrye had, however, pushed into Rupert's Land, and built Fort St. Pierre, on Rainy Lake, in 1731; Fort Maurepas at the mouth of the Winnipeg River, in 1734; Fort Bourbon, in 1749; Fort Dauphin a little before that date and many others. (20)

These incursions, however, in the rear of the granted territory, all took place after the grant of the charter and the formal occupation of the the country by the company and would not, in our opinion, invalidate the company's rights. The true principle of occupation appears to be laid down by Phillimore quoting with approval the claim of the United States to Louisiana. "The first of these (prin-"ciples) is, that when any European nation takes possession "of any extent of sea coast, that possession is understood "as extending into the interior country, to the sources of "the rivers, emptying within that coast, to all their bran-"ches, and the country they cover, and to give it a right, "in exclusion of all others to the same." (21)

Taking this view of the English and Hudson's Bay Company's occupation, it becomes unnecessary to consider the effect of the treaties of Ryswick, (1697) and Utrecht, (1713). Many eminent counsel have expressed opinions favourable to the contention of the company. The first, that of Sir Dudley Ryder and Sir William Murray—Lord

(20) Report on H. B. Co., 1749, p. 221.

(21) International Law, Vol. 1, pp. 277, et seq. Hall, International Law.

Mansfield — in 1748 supports the grant as far as it goes. Those of Mr. Justice Holroyd, Sir Samuel Romilly, Mr. Cruise, Mr. Scarlett, Mr. Bell and Dr. Stoddart are very exhaustive, and most decided in regard to the validity of the grant, and enter very fully into the question in all its bearings. The North West Company in 1816 obtained opinion of Sir Arthur Pigott, Mr. Spankie, and Lord Brougham, but while these gentlemen expressed very decided views, as regards the illegality of the company's claims, for exclusive trade, a careful examination of their opinion, will show that it is not by any means so unfavorable to the grant. Their concluding remarks being apparently based on the assumption that the French Beaver Company had prior rights in the premises, which is not the case. In fact they admit "that the right of the Crown "merely to erect a company for trading by charter, and "make a grant of territory, in King Charles the Second's "reign, may not be disputed ; on the other hand . . . this "charter seems to attempt to . . . grant an *exclusive* right "of trading, etc . . ."

The opinion of Sir Richard Bethell and Sir Henry S. Keating, the Attorney-General and Solicitor-General in 1857, (22), states *inter alia*, "that the questions of the "validity and construction of the Hudson's Bay Company's "charter cannot be considered apart from the enjoyment "that has been had under it during nearly two centuries, "and the recognition made of the rights of the company "in various acts, both of the government and legislature " . . . With these preliminary remarks we beg leave to "state in answer to questions submitted to us, that in our "opinion the crown could not now, with justice, raise "the question of the general validity of the charter ; but "that on every legal principle the company's territorial

(22) Report on H. B. Co., 1857.

"ownership of the lands and the rights necessarily inciden-
"tal thereto . . . ought to be deemed to be valid."

In Rupert's Land itself, we have the favourable judgments of Mr. Recorder Thom (23), of Chief Justice Wood (24), and the opinion of Chief Justice Johnson before mentioned. Last of all, we have—in spite of the deprecatory expressions of Sir George Cartier, who while bidding for Rupert's Land, like a shrewd buyer sought to depreciate the value of the would-be purchase—the final and unequivocal recognition of the company's rights, by the payment to them by the government of Canada of a million and a half of dollars, they still retaining one-twentieth part of the territory within the fertile belt.

(To be continued.)

(23) Re Calder, 17 Aug. 1848; Records Quarterly Court.
(24) Queen v. Ambrose Lepine.

NOTES AND COMMENTS.

HIGH FEES.

The legal profession will remember the movement which was begun in the spring of 1889, by certain gentlemen or the Winnipeg bar, to reduce the outrageously high fees which were then being exacted by the Benchers of the Law Society, with the avowed intention of taxing the bar to build a Court House. The profession will also remember the virulent opposition that this measure encountered on the part of certain benighted Benchers of the Law Society, who held out for high fees in defiance of the wish of the Bar, expressed by a resolution to the effect that the fees should be reduced to $7.50 per annum. The great objection taken to the proposed reduction was that the income of the Law Society would be very much reduced, and that the *corpus* of the large fund, uselessly hoarded up, would be encroached upon. The opponents of the "high tariff" replied that, if necessary, the fund could be re-invested at a higher rate of interest than the present four per cent., so as to make up for the loss of income, and that even if the fund were encroached upon, it did not matter, as it should be used for the benefit of the profession at large, when required, and not uselessly garnered for posterity. They further maintained that it would be just as reasonable to ask the medical profession to build a hospital, as to require the Bar to build a court house. It is gratifying to find that the lugubrious prophecies of the obstructionists have come to naught. By a reference to the last report of the Law Society's revenue and expenditure, we learn that so far from there being a deficit, the Society has actually carrried

over to the rest account, no less a sum than two hundred and ninety-nine dollars and eighty cents, and almost every-one of its members has saved ten dollars. We mention the above as an instance of the unreasoning opposition that has presented itself to nearly every reform proposed in the Law Society of Manitoba. We have, however, much pleasure in stating, on the other hand, that there is now a disposition manifested on the part of the governing body to more carefully consider the interests of the profession. This disposition is almost wholly due to the zealous efforts of certain of the new Benchers who were elected in 1889. They have, indeed, done "yeoman service," and are entitled to the thanks and continued support of the profession. We are glad to say that a large number of reports and text books, which were urgently needed, have been ordered for the library. The notorious report of the committee on the library accommodation, referred to in our last number, has been treated with the quiet contempt it richly deserved.

THE LAW REPORTS.

In convocation on 13th May, ult., the Benchers decided to re-model the present system of reporting. Mr. Ewart, Q. C., will retire on the 1st September next. The salient points of the order effecting the change are as follows :

"Whereas, in the opinion of the Benchers, it is desir-
"able to have a reporter who will be present in court and
"chambers at all times during the argument of cases to
"report Practice and other cases of interest, as well as such
"as have hitherto been reported. . . . It is ordered . . . .
"that the secretary be instructed to give notice to the
"members of the profession that applications will be receiv-
"ed up to the first day of next term, (14th July), for the
"position of official reporter at a salary of $75.00 a month."

A notice has been posted in the Court House to this effect. This is a step in the right direction, and we doubt

not that it will result in the Law Reports being ultimately satisfactory to the profession.

The salary named, while larger than the amount previously paid, is not all too large, in fact we doubt if it be enough. A reporter who conscientiously discharges his duty, will find it necessary to spend a very large portion of his time at the Court House, and this, owing to the very inconvenient and out-of-the-way situation of the court, will have a detrimental effect on the practice of any young barrister. The position will be no sinecure. There are many members of the junior bar who are well fitted to fill it ; the question is, will they have the time ? We trust a suitable person may be obtained, as good and efficient reporting is really a necessity.

DELINQUENT ATTORNEYS.

For the benefit of those gentlemen who will persist in maintaining that the names of erring attorneys are not published in England, we reproduce the following, *verbatim*, from the *Solicitors' Journal*, April 26th, 1890 :

"SOLICITORS ORDERED TO BE STRUCK OFF THE ROLLS.

April 17.—CHARLES EEDE, (late of Brompton-road.)
April 22.—JAMES WEST JONES."

We also refer them to the following cases reported in the *Law Times* for April 26th, in the full names of the attorneys against whom the charges are brought :

Re HERBERT TRITTON SANKEY, a solicitor, etc., and
Re CHARLES EEDE, etc.

FLOTSAM AND JETSAM.

A CHIEF JUSTICE'S IDOL.

The late Chief Justice Wallbridge had a very strong aversion to any legislation which at all fettered the right of one citizen to bring suit against another, if he felt so disposed. The pernicious "Act respecting . . . . . suits against railway companies," passed by the Legislature of Manitoba in 1883, providing that before an aggrieved party could proceed with an action against a railway company, he must file an affidavit stating his claim, and also comply with other formalities, very properly raised the chief justice's ire in no small degree. We happened to be present in chambers on the argument of a summons taken out by the Canadian Pacific Railway to stay the proceedings of a plaintiff, who had not complied with the Act. The late Mr. Fred. McKenzie, Q. C., argued the matter on behalf of the plaintiff, and denounced the Act and its spirit in vigourous language. The chief justice followed him closely, and when the counsel sat down, exclaimed, "Mr. McKenzie, I regret I will have to abide by "the Act and decide against your client. My duty com- "pels me to give force to this outrageous legislation, which "is a disgrace to the statute book and to those who enact- "ed it. But when I discover something which is beyond "anything in the heavens above, or in the earth beneath, "or in the waters under the earth, I thereupon fall down "and worship it, which I do this statute," and pushing back his spectacles with an angry gesture, he threw the offending Act over the head of the astonished chamber-clerk on the long table just in front of the writer. This obnoxious law was repealed last session.

THEN AND NOW.

Mr. James Radford, an octogenarian solicitor, of Newcastle-upon-Tyne, has a very interesting letter in the *Law Journal* for April 26th, last. He went under articles in 1823, in Manchester, and gives a most instructive *resume* of the various changes which have occurred in the practice of law since that date. His communication is too lengthy for re-production here, but we make a few excerpts from it of general interest. In regard to arrest for debt, he says that, on mesne process, it was, "in full swing "for debts of and over £ 20. On a creditor making affi- "davit for that amount, a debtor was summarily arrested, "'hauled off' to the sheriff's house, till two sureties joined "with him in a bail bond to the sheriff, and civility money "was paid (say a guinea)." About the forties "were the "times when articled clerks not only fair copied, but "engrossed deeds, etc., and were at the office from 9 a. m., "to 8 p. m., with short intervals for dinner and tea. On "a pressure of business we had to work till midnight to "catch the London mail from Manchester. Clerks, "however, came out smart on Sundays—some in white "'cords' and top boots. Blue coats with white or nan- "keen trousers and "toilinette" vests, were ordinary wear. "Billycock hats were only worn by cartmen. William "Harrison Ainworth, the novelist, and John Monk, after- "wards Q. C., were then under articles and associates of "mine in Manchester . . . . ." Postage was ten-pence between Manchester and London prior to 1839, when it was four-pence. The office in Manchester paid, about 1827, £ 8 postage to Frankfort for a parcel under a pound weight. He concludes with the following warning to the grumblers of thr present day :

"Those who knew when there were . . . . no railways, "no telegrams, no shorthand clerks, letters and bills hand-

"copied, no envelopes, no watches, no penny post, no "tramcars, may well exclaim, *O fortunati juvenes.*"

TRUSTS OR MONOPOLIES.

Now that the question of Trusts and Combines has become such an important one in the political economy of nations, the following quaint definition of monopolies given by Sir John Culpepper, during the sway of the Long Parliament, will be of interest. It will be found on page 78 of the Senate Debates of last session :

"They, said John, are a nest of wasps, a swarm of vermin which "have overcrept the land. Like the frogs of Egypt, they have gotten "possession of our dwellings and we have scarce a room free from them. "They sup in our cup; they dip in our dish, they sit by our fire. We "find them in the dye fat, washbowl and powdering tub. They share "with the butler in his box. They will not bate us a pin. We may not "buy our clothes without their brokrage. They are the leeches that "have sucked the common wealth so hard that it is almost Nectical."

TERM BRIEFS.

The following gentlemen were called to the bar during Easter Term :

Mr. Orange Hezekiah Clarke ; Mr. Anson Whealler.

The following were admittted to practice as attorneys :

Mr. William Bearisto ; Mr. Anson Whealler.

Epitome of English Decisions.

This review only includes cases reported in the English periodicals subsequent to the first of May last.

ASSIGNMENT.—The word "assignment" in s. s. 1 (*a*) of Sec. 4, Bankruptcy Act, 1883, meant an assignment in the proper legal sense of the term, and does not include dispositions, not assignments, by which a bankrupt's property might be disposed of for his creditors. In re *Spackman*; W. N. 96.

BILLS OF EXCHANGE.—A holder of a promissory note, desired to forgive the debt and not being able to find the note instructed a servant to make a memo. to destroy the note when found. This was done. The note was found after his death, but the renunciation was held not to be a renunciation in writing within the meaning of the B. of E. Act 1882; s. s. 62, 89. In re *George*; L. J. 63; L. T. 26.

COMPANY—WAIVER.—Where a shareholder attends a meeting of the proprietors of a bank, which meeting has not been properly called by reason of proper notice not having been given, and simply votes against a resolution and does not protest against the irregularity of its introduction, he is to be taken to have waived the irregularity in the notice. *Henderson* v *Bk. of Australasia;* W. N. 98, L. T. 25.

COMPANY—Winding-up.—A company with a reserve capital will be wound up on an application of a shareholder, in an extreme case. In re *Bristol* v *Joint Stock Bank*; W. N. 93; L. J. 66.

COMPANY—Winding-up.—A company incorporated as bankers, which afterwards ceased active banking and entered upon land speculation and dealing in shares, will in certain cases be wound up upon an application of a shareholder. In re *Crown Bank Lt'd*, W. N. 98, L. T. 25.

CONTEMPT—Newspaper Comments.—A newspaper publishing a statement thus : "The Crown Bank Letting the Light in.". "We have repeatedly directed attention to this so-called Bank and we have not hesitated to describe it as a fraudulent concern" pending winding-up applications, is guilty of contempt, if it is clear that the statements are one-sided, and prompted by those filing the petition for winding-up. In re *Crown Bank* ; W. N. 98, L. T. 25.

LANDLORD AND TENANT.—Where a tenant covenants to leave the premises "in good tenantable repair," he is bound to leave the premises, considering their age, locality, etc., in such repair as would make them reasonably fit for the occupant of the same class of tenants. *Proudfoot* v *Hart* ; L. T. 24.

LIGHT—Injunction.—A mandatory injunction will issue for the removal of a building which obstructs ancient lights, although the building has been completed before the issue of the writ. *Lawrence* v *Horton* ; L. J. 64, L. T. 24.

MASTER AND SERVANT.—Where a servant receives money from his employer for a certain purpose, but converts it to his own use, the master can follow it. *Lister Co.* v *Stubbs*; W. N. 98 ; L. J. 59 ; L. T. 6.

MORTGAGE—Foreclosure.—If a receiver is appointed, and the accounts taken, a day fixed for redemption, and after the date for redemption has expired, the receiver receives money on account of the estate, before the final order is made, a new account must be taken and a new day fixed. *Ross Impm't Commrs* v *Usborne* ; W. N. 92.

MORTGAGE—Solicitor Mortgagee—Costs.— The mortgagee in order to redeem, must pay *inter alia*, the proper costs, etc., of the mortgagee, in relation to the mortgage debt and security, but is not bound to pay him for personal services, even if the mortgagee would have been entitled to charge for them, if performed by another person, and the rule is a general one. In re *Wallis*, W. N. 89, L.T. 5.

NEW TRIAL—Discretion.—A statute giving a county court judge power to grant a new trial, in any case what-

ever, if he shall think just, does not give him an absolute power to grant a new trial, but only for such reasons as would be sufficient in law for granting a new trial in the Superior Court. *Murtagle* v *Barry* ; W. N. 94.

PRACTICE—Evidence.—In the absence of an express rule there is no time at which the evidence is to close on any inquiry in chambers ; it is discretionary with the judge. The general rule, however, is that after the cross examination of one party the other will not be allowed to file affidavits in reply. *C't of Appeal ; Issard* v *Davies ;* L. J. 57 ; L. T. 5.

PRACTICE.—Production of State (Colonial) Documents.—The defendant, an agent of a Crown Colony, cannot be compelled in action against him in his colonial capacity, to produce state (colonial) documents. *Wright* v *Mills* ; L.J. 59

PRACTICE—Answer.—A creditor is only entitled to a receiver as against an executor, when it could be shown that the assets were being wasted and the latter's right to prefer, or retain will not be interfered with. *Molony* v *Brooke* ; L. J. 65.

FOREIGN JUDGEMENT—Fraud.—Where fraud has been practiced on a foreign court, such may be set up in England on an action on the judgment. *Valdala* v *Lawes* ; L. T. 5.

PRACTICE—Want of Prosecution.—Where an order has been made in chambers dismissing an action, unless a statement of claim is delivered within a certain time and it is not delivered before the order takes effect, which may be although the order has not been drawn up or served before it became operative. *Script P. Co.* v *Gregg* ; L. J. 58, L. T. 26.

PROHIBITION.—A writ will not lie at the suit of a married woman, against whom judgment has been recovered in an inferior court, by default, in her maiden name, she having sued and been sued in such name, in other proceedings therein. *Beard* v *Bellwood* ; L. T. 27.

SOLICITOR AND CLIENT—Charging Order.—Where a plaintiff and defendant without the knowledge of the

plaintiff's solicitor compromise an action, on which a fund has been paid into court, the solicitors are entitled to a charging order upon it, although it is not yet recovered or preserved. *Moxon* v *Sheppard* ; L. J. 60, L. T. 7.

SOLICITOR AND CLIENT.—Where a solicitor employs a clerk as his *alter ego*, at a separate office, as in the present case, every client ought to be distinctly informed of the fact, so that if he requires the solicitor's personal attention he can apply to him for it, but where a retainer is given to a servant in the belief that he is the master, no action thereon will lie. *Ratcliff* v *Crookshank* ; L. J. 268.

TRUST—Discretionary, for Maintenance. Trustees who are empowered to pay certain sums of money under a will to a legatee for maintenance in such manner as they think fit, cannot pay to the legatee such sums after they have received notice of an assignment thereof by the l., and are liable to repay the same to the assignee. *Heming* v *Neil* ; W. N. 92, L. T. 25.

WILL—Illegitimacy.—In referring to the use by a testator of the terms "husband" and "wife" to describe persons, who are not lawfully married, the rule is, that if you find that that is the nomenclature used by the testator, taking his will as the dictionary from which you are to find the meaning of the terms he has used, that is all the law requires. In re *Jodrell* ; W. N. 89, L. J., 61, L. T. 5.

New Rules of The Law Society.

On the seventh day of May, by by-law No. 18, the following new rules of the Law Society of Manitoba, were brought into force. They should be carefully considered and acted upon by all students-at-law and articled clerks in the Province. By order to that effect these rules "shall "apply to all persons who shall enter the Society as "students-at-law, and also to the unexpired terms of those "who are now students-at-law, on and from the first day "of July next."

52 a. Students at-law who are not articled clerks, shall actually and *bona fide* attend in a barrister's chambers for the same respective periods as articled clerks are required to serve under articles.

52 b. No person attending in the chambers of a Barrister, shall, during his term of attendance, hold any office of emolument, or engage or be employed in any occupation whatever, other than that of student in attendance.

52 c. Every candidate for call to the Bar who has not served under articles, shall, with his petition for call, leave with the Secretary, answers to the several questions set forth in schedule "A" of this rule, and also answers to the questions set forth in schedule "B" of this rule, signed by the Barrister or Barristers in whose chambers such candidate has attended, together with the certificate in the last mentioned schedule also contained.

52 d. In case any such candidate for call to the Bar at the time of leaving his petition and papers with the Secretary as hereinbefore provided, proves to the satisfaction of the Examining Committee or the Secretary, that it has not been in his power to procure the answers to the questions contained in the said schedule B, from the Barrister in whose chambers he may have attended during any part of the time, or the certificate therein also contained, the Examining Committee or the Secretary shall state such circumstances specially in their or his report to convocation.

SCHEDULE A.

The following questions are to be answered by the candidate:

1. What was your age at the date of your admission?

2. Have you actually and *bona fide* attended during your whole term ot years in the chambers of some barrister? If so, give name and address of such barrister and if not, state the reason.

3. Have you, at any time during the said term, been absent without permission of the Barrister in whose chambers you attended? And if so, state the length and occasion of such absence.

4. Have you during the period of your attendance been engaged or concerned in any profession, business or employment other than your professional employment as student in attendance?

5. Have you, since the expiration of your said term, been engaged or concerned, and for how long a time, in any, and what, profession, trade, business or employment, other than the profession of a barrister?

SCHEDULE B.

The following questions are to be answered by the Barrister or Barristers in whose chambers the student has attended for any part of his term:

1. Has A. B. actually and *bona fide* attended during his whole term of years in your chambers? If not, state the reason.

2. Has the said A. B. at any time during the said term been absent without your permission? and if so, state the length and occasion of such absence.

3. Has the said A. B., during the whole term, been engaged or concerned in any profession, business or employment other than his professional employment as student in atteudance?

4. Has the said A. B., during the whole term, with the exceptions above mentioned, been faithfully and diligently employed in your professional business of a barrister?

5. Has the said A. B. since the expiration of his said term, been engaged or concerned and for how long a time, in any, and what, profession, trade, business or employment, other than the profession of a Barrister?

6. And I do hereby certify, that the said A. B. has actually and *bona fide* attended in my chambers for the period of.....; and that he is a fit and proper person to be called to the Bar.

THE

WESTERN LAW TIMES.

VOL. I. JULY 15, 1890. No. 4.

The Rise of Law in Rupert's Land.

(*Continued.*)

(2) *What was the area, or extent, of the plantation of Rupert's Land?*

By referring to any good map of British North America, the original extent of Rupert's Land may easily be approximately ascertained. The heights of land dividing the various watersheds form the boundary of the grant under the charter, distinguishing the "lands and territories upon the countries, coasts, and confines, of the seas, bays, lakes, rivers, creeks and sounds aforesaid" from those on the rivers, etc., which do not fall into Hudson's Bay. The vast territory thus comprised almost surrounds Hudson's Bay, and is very irregular in form. Sir George Simpson in his evidence before the Parliamentary committee of 1857, (25) says: "I describe the Rocky Mountains as the limits "of Rupert's Land to the west. . . . The northern "boundary. . . . I call the Methy Portage and Lake, "dividing the waters that fall into the Bay from those "that fall into the Arctic Sea; there is a height of land "from the Methy Portage; . . . as you come eastward "the territory spreads very much to the north . . . "and goes up the Melville peninsula which seems to be

(25) Report on H. B. Co., 1857, pp. 45 and 46.

"about the northernmost part." It will be seen also, that according to the terms of the charter, the territory extended a considerable distance south of the 49th parallel and was occupied by the Company, who, says Keating, (26) "had a post here (Pembina), until the spring of 1823, when "observations, made by their own astronomer, led them to "suspect that it was south of the boundary line, and they "therefore abandoned it." The greater part of what are now called the North West Territories, Keewatin, the North East Territories, and a portion of Ontario, were within the grant. The Indian Territories, which have been defined as "such parts of North America as are not "part of the lands or territories granted to the Company "by their charter, and not forming any of Her Majesty's "provinces in North America, or of any lands or territories "belonging to the United States of America or other "foreign power," (27) were not within the jurisdiction, and formed no part of the possessions of the Hudson's Bay Company under their charter. The Company exercised control as hereinafter mentioned over these last named regions by virtue of the Royal Licence of 6th December, 1821, followed by that of 30th May, 1838. It is important to note that the Proclamation of Quebec, October 7th, 1763, declared it to be the Royal will and pleasure to receive under "Our Sovereignity, protection, and dominion "for the use of the said Indians, all the lands and terri-"tories not included within the limits of Our said three "new Governments (East Florida, West Florida, and "Grenada), or within the limits of the territory *granted to* "*the Hudson's Bay Company*," etc. . . . This phrase is significant and is more than the mere reference to the Company's claims or rights often to be met with. Those desirous of more fully investigating this branch of the

(26) Keating's Expedition etc , vol. ii, p. 38.

(27) Report on H. B. Co., 1842, p. 3. Letter Gov. Pelly to Lord Stanley, p. 9. Royal License to trade etc.

matters under consideration, will find it minutely discussed in the Boundary Papers, and also in the reports of the trials of De Reinhard and McLellan for the murder of Owen Keveney, at the Dalles on the Winnipeg River, 12 miles north of Rat Portage, on Sept. 11, 1816. (28).

(3) *What laws were introduced therein by the above provisions of the charter?*

"The Common Law of England," says Mr. West, afterwards Lord Chancellor of Ireland, 1718, "is the "Common Law of the Plantations, and all statutes in "affirmance of the Common Law passed in England, "antecedent to the settlement of a colony, are in force in "that colony, unless there is some private Act to the "contrary; though no statutes made since those settle-"ments, are there in force, unless the colonies are "particularly mentioned. Let an Englishman go where "he will, he carries as much law and liberty with him as "the nature of things will bear." (29). . . . "English subjects," say Attorney and Solicitor Pratt and Yorke, . . . "carry with them your Majesty's laws, wherever they form colonies, and receive your Majesty's protection, by virtue of your Royal charters." (30). "Where Eng-"lishmen establish themselves in an uninhabited or "barbarous country, they carry with them not only the "laws, but the sovereignity of their own state, and those "who live amongst them, and become members of the "community, become partakers of and subject to the same "laws." (31). It appears, therefore that the laws introduced into Rupert's Land at the date of the charter were the Common Laws of England at said date, so far as applicable

(28) Report of the Trials of Charles De Reinhard, *et al*, Montreal, 1818.

(29) Chalmer's Colonial Opinions, p. 206.

(30) Id. p. 207. See also pp. 207-8-9, *et seq.*

(31) *Adv-Gen.* v. *Ranee Surnomoye Dossee.* 2 Moore, P.C.C.N.S. 22.

to the plantation. This is the case as stated by Chief Justice (now) Sir F. G. Johnson in his Report on the Laws of Manitoba (32), and is also the view which is asserted by Mr. Sheriff Ross (33), to have been that of Recorder Thom. This principle has been adopted by the Court of Queen's Bench in this Province. (34). This then was the state of the law when Lord Selkirk, having acquired possession from the Company, by deed bearing date the 12th day of June, 1811, of a vast tract of land called the District of Assiniboine, in the most fertile part of Rupert's Land, sent out Captain Miles McDonnell as Governor of the same. (35). He, having arrived at Red River in Aug., 1812, on the 4th of September caused Lord Selkirk's grant and his own commission as governor, to be publicly proclaimed, following up the proclamation by a salute of artillery from the neighboring fort. Having appointed John Spencer as sheriff of the District, he proceeded to assert the rights of the proprietor, Lord Selkirk, and caused a further proclamation to be made, on Jan. 8th, 1814, respecting the food supplies of the colony and the fur trade, threatening offenders with arrest and prosecution. On the 21st October, 1814, he addressed a formal notice to Duncan Cameron, the agent of the N. W. Co'y. at the Forks of the Red River, to quit the premises within six calendar months, (36). Similar notices were served on all the chief officers in command of

(32) Boundary Papers, 1880.

(33) Alex. Ross, Red River Settlement, p 383.

(34) *Sinclair* v. *Mulligan*, 5 Manitoba Rep., 17. *Queen* v. *Lepine*, Judgment of C. J. Wood, pp 23, *et seq.*

(35) This territory, called also Ossiniboia and Assiniboia, consisted of upwards of 116,000 square miles. For its boundaries see deed in Morris' Treaties, p. 201.

(36) Report 1819, p. 10.

District of Assiniboia. } To Mr. Duncan Cameron, acting for the North West Company at the Forks of Red River.

TAKE NOTICE, That by the authority and on behalf of your landlord, the Right Honourable Thomas Earl of Selkirk, I do hereby warn you, and all your associates of the North West Company, to quit the post

the North West Company's posts in the district. "This," says Commissioner Coltman, referring to the notice, "was the first unequivocal declaration on behalf of the "Hudson's Bay Company, or the Earl of Selkirk, of an in-"tention to enforce the rights of the charter. (37). . . ." The efforts of Governor McDonnell were strenuously opposed by the North West Company, frequent frays occurred in which several lives were lost, and the Governor, after a sharp encounter with the opposing forces at Fort Douglas, surrendered himself a prisoner under a warrant from Fort William, and left Red River on 21st June, 1815. He was succeeded by Governor Robert Semple, a man whom even his enemies acknowledged to be chivalrous, upright, and brave, and who arrived at the settlement on 3rd November, 1815, with Mr. Alexander McDonnell as his sheriff. It is not within the scope of this article even to notice the collisions which frequently occurred between the opposing factions, and which eventually culminated on the 19th June, 1816, in the deplorable murder of this unfortunate gentleman and about twenty of his officers and men. Little did the lamented Governor know, that when he declared (38) that there were "schemes of farther and still "farther retaliation, the shock of which, if I mistake not, "should be felt from Athabasca to Montreal," that he was unwittingly prophecying his own dreadful fate, the shock of which was felt, in truth not merely from Athabasca to Montreal, but from the shores of the Pacific to the Parliament at Westminster. In consequence of this sanguinary occurrence, commissioners were appointed to investi-

---

and premises you now occupy at the Forks of the Red River, within six calendar months from the date hereof.

Given under my hand at Red River Settlement, this 21st day of October, 1814.

(Signed) MILES MCDONNELL.

(37) Report 1819, p. 164.

(38) Letter, Gov. Semple to A. McDonnell, 14 May, 1816. Trials of Earl of Selkirk, Montreal, 1879, p. 153.

gate the state of affairs in Red River, and a voluminous report was laid before Parliament in 1819, and many of the parties engaged in the murder were brought to trial in Quebec and York by virtue of the Canada Jurisdiction Act (11th August, 1803,) 43d. Geo. III, cap. 138. This Act (39) by which it was sought to introduce a jurisdiction other than that exercised by the Hudson Bay Company's officials at the various posts under the charter, proposed to extend the "Jurisdiction of the Courts of "Justice, in the provinces of Lower Canada and Upper "Canada, to the trial and punishment of persons guilty of "crimes and offences, within certain parts of North "America, adjoining to the said provinces," because "crimes "and offences" had been "committed in the Indian Terri-"tories and other parts of America, not within the limits "of those provinces, or cognizable by their, or any other "jurisdiction." It was under this statute that the trials of various persons at York and Quebec were held in 1818, and though De Reinhard was on 5th June of that year sentenced to death by Chief Justice Sewell at Quebec, for the murder above mentioned, yet he was subsequently pardoned by the British authorities on the ground, as has been alleged by high authority, (40) that the murder having been committed within the territories of the Hudson's Bay Company and not in the Indian Territories, the court which condemned him had no jurisdiction. Though the question as to the offence being committed in the Company's Territories did not arise during the trial, yet much weight is given to this view, by the provisions of 1 and 2 Geo. IV., cap. 66, (2nd July, 1821), being "An Act for regulating the Fur Trade, and establishing a criminal and civil jurisdiction within certain parts of North America," the preamble reciting, *inter alia*, that "doubts have been entertained

(39) This Act, not given in the Statutes at large, will be found on p. 21 of the Report of 1819.

(40) *Inter alia*, Chief Justice Wood in *Queen* v. *Lepine*, p. 23.

"whether the provisions of (the Canada Jurisdiction Act) "extended to the territories *granted* by the charter to the "Hudson's Bay Company." This Act declared the Canada Jurisdiction Act to be in full force through all the territories of the Hudson's Bay Company, and gave a *concurrent* civil and criminal jurisdiction in the said Territories to the courts of Upper and Lower Canada, providing that all suits and actions relating to lands in such Territories should be decided according to the laws of England and not according to those of Upper Canada. It also provided for the establishment of Courts of Record, the appointment of Justices of the Peace, etc., and many other matters therein contained. The concluding section declared "that "nothing in this Act contained shall be taken or construed "to effect any right, privilege, authority or jurisdiction "which the (H. B. Co.) . . . . are by law entitled to "claim and exercise under their charter, but that all such "rights, etc., shall remain in as full force, virtue and effect, "as if this Act had never been made; anything in this "Act to the contrary notwithstanding." Some have gone to the length of asserting, (41) unwarrantably we submit, that this clause was merely a meaningless reservation. However difficult it would be after a careful perusal of the clause, under any circumstances, to arrive at such a conclusion, we have fortunately a side light thrown on this very portion of the Act which negatives such a suggestion. The Rt. Hon. Edward Ellice, M. P., in his evidence before the Parliamentary Committee (42) referring to that very clause, stated that the Bill was introduced by Lord Bathurst at his (Ellice's) own suggestion; in fact he states "I took "special care in the Act to guard all the privileges of the "Hudson's Bay Company. The Crown has no power by "that Act to override the rights of the Hudson's Bay Com-"pany within their own territories." There is, we think,

(41) Wm. McD. Dawson, Boundary Reports, 1880, p. 366.
(42) Report 1857, p. 324.

really no room for doubt as to the intentions and objects of the government in passing this Act the consequences of which they doubtless foresaw, and were prepared to abide by.

[To be concluded.]

NOTES AND COMMENTS.

THE EXCHEQUER COURT.

The Exchequer Court of Canada held its first session in Manitoba on June 2nd and following days, at the Court House, Winnipeg. The Hon. Mr. Justice Burbidge presided, and Mr. L. A. Audette officiated as Registrar. There were only two contested cases on the list, *The North West Navigation Co.* v. *The Queen*, a case arising out of rebellion claims in 1885, and *The Queen* v. *Thomas*, an information filed by the Attorney General of Canada against William Thomas, to set aside the patent issued to defendant, in October, 1887, for lot 22 in St. Peter's Parish. Judgment was reserved in both cases. The latter is a case of more than ordinary interest, the question of Indian title being under consideration. The presence of Chief Henry Prince, of St. Peter's Reserve, arrayed in the orthodox scarlet coat with treaty medal "attachment," threw an unaccustomed glamour over the proceedings, and afforded what might be fairly termed a *colourable* right to the claims of his tribesman, Thomas. Several *ex parte* applications were made in regard to the payment of compensation moneys for lands expropriated for the Stonewall branch of the Canadian Pacific Railway. Before the court proceeded to hear the matters before it, Mr. Aikins,

Q. C., as the representative of the Law Society, welcomed His Lordship to the Province, to which expression His Lordship replied in suitable terms.

ATTORNEY AND CLIENT.

A barrister may sue for his fees in this Province without rendering a bill or waiting for payment. This is as it ought to be. A solicitor may not sue for his fees and disbursements unless he renders his signed bill, and then not till after a period of one month has elapsed after such rendering. A curious anomaly here arises. The majority of our bar are solicitors as well as barristers, and the result is that the same person may sue his client immediately for that part of his bill incurred for his services as a barrister, and have to render a signed bill and wait a month for what might be a very small and insignificant balance, due for his services as a solicitor. This truly ridiculous state of affairs is caused by our Legislature not having gone quite far enough in the changes effected in these matters. Many reforms have been introduced, principally the right of a barrister to sue for fees, and the abolition of the offences of maintenance and champerty, but what is now required, to correct an absurd position, is the abolition of this rule requiring a solicitor to wait a month after the rendering of his bill, before he can bring an action. Ample safeguards can be maintained by requiring him to render, prior to action taken, his full bill, duly signed as before, but he should be allowed to sue for his solicitors fees and moneys disbursed as he now can for his fees as a barrister. As a matter of fact, as all the profession knows, no attorney ever does sue for his fees except in very special and exceptional circumstances, *e. g.* the case of an absconding debtor, and there is really no reason why he should be disabled from collecting his his just debts in all like cases. He should be on the same footing as any other business man. Having rendered his

signed bill it could be taxed and inquired into by the court at any stage of the cause, without the useless, and often fatal, delay to the attorney. The client's interests would thus be afforded every protection. We would like to see an Act introduced at the next session of the Legislature carrying out this view, which we are sure will commend itself, not only to the bar but the laity as well, and wipe out another encumbrance not suitable to the business methods of a new country.

AND STILL THEY COME.

The Queens Counsel "fiend" at Ottawa has driven forth still another drove of the great unknown, and conferred upon them the now almost pernicious distinction of Q. C. Pernicious, because it most unfairly gives very indifferent lawyers precedence over those having real and undoubted merit, for it still carries a certain weight with an undiscriminating public. A cure could easily be effected in the different provinces, and we propose the following as a simple and effective remedy for this invidious selection, and one which would stop the melancholy farce of an incapable presenting his patent of precedence to a disgusted Bench :

Let an Act be passed providing that any barrister, immediately on his call to the Bar, could procure from the stamp vendor at the court house, for the sum of ten cents, a patent as Queen's Counsel, entitling him forthwith to all the privileges of that body, without presentation thereof to the Bench, or gymnastics of any kind. We make this suggestion in sober earnest, actuated solely by the desire to abate a nuisance. The Law Society could help on the good cause by having on hand a job lot of silk gowns and red bags, which could be retailed to the members at the actual cost price, thus placing them within the reach of all foolish enough to desire them under such circumstances.

We would again ask the gentleman here, who notoriously controls the nominations in this Province and the West, why he has for the second time passed over the Attorney-General, and also why he overlooked Mr. Munson, who *is* entitled to a silk gown, if any one of the late appointees is.

GREEN BAG AND THE SUPREME COURT.

The Green Bag for June is worthy of the attention, not merely of all professional men, but of Canadian lawyers in particular. It contains illustrations, lives of, and comments upon, the judges of the Supreme Court of Canada. There is one thing in particular that the author, Mr. R. Cassels, Q. C., deserves special credit for, which is, that he has not slobbered the judges with excessive and indiscriminate praise. Cokes and Hales are not products of every generation, and every judge does not attain their standard. It is a pleasure to read the calm and thoughtful manner in which the court is presented to the public.

THE CANADIAN LAW TIMES.

This journal in its June number, p. 142, is moved to "trust that the demise of the *Manitoba Law Journal* is not to be taken as prophetic of the fate of law journals in the plucky Prairie Province." In all kindliness we would suggest to our contemporary, that it would better employ its leisure moments in endeavoring to hold its own with the *Canada Law Journal* in Ontario, than by composing stale and mournful epitaphs on the one legal publication which came to grief five years ago in the "plucky Prairie Province."

THE LAW REPORTERSHIP.

Just on going to press we learn that Mr. Ghent Davis has been appointed Law Reporter to the Society of Manitoba. Mr. Davis, while a bencher of the Society, well earned the hearty approval and support of the

profession, and can ill be spared from convocation. While we deeply regret his retirement, yet we feel sure that in his new office he will prove fully as capable as he was in the old. We congratulate Mr. Davis on his appointment, and the Benchers on the wisdom of their choice.

A NEW BENCHER.

Mr. Frank S. Nugent, of this city, has been elected a Bencher *vice* Mr. Mulock, Q. C., resigned. While not approving of the practice of vacancies in the Benchership being filled by the Benchers, yet this appointment will be a popular one with the Bar. We welcome Mr. Nugent to the dignity.

PORTRAITS OF THE JUDGES.

We are glad to announce that the Law Society has given the order for the painting of the portrait of the late estimable Chief Justice Wallbridge. We would suggest that the portrait of the present Chief Justice be also painted, without further delay, by a competent artist. In order to complete the gallery, the Benchers would do well to obtain a portrait of the late Hon. Alex. Morris, the first Chief Justice of this Province. He opened the first assize held in Manitoba with considerable state, and identified himself with the early history of the country, both by his active participation in public affairs and by his well-known literary efforts. It is true he was not Chief Justice for a very long period, yet having been subsequently appointed Lieutenant-Governor of this Province, he was no stranger to the people. The question, however, of length is no criterion of merit and should not be entertained. We desire to have a complete gallery of the Chief Justices of Manitoba, anything short of this would not be worth spending money on.

FLOTSAM AND JETSAM.

CONVICTION OF A COW.

We are filled with awe when we ponder on the legal future that awaits the two J. P.'s who drew up the original of the marvellous document given below. Let us hope that the operations of these magistrates extend only to cows not to human beings.

Province of
SASKATCHEWAN,
To wit:

Be it remembered that on the 14th day of Dec., in the year of Our Lord one thousand eight hundred and eighty-nine at the house of Robert Headrick at Red Deer Hill in the District of Kinistino in the Province of Saskatchewan a diseased red and white cow is convicted before us, Alex. S——— and A—— S——— two of Her Majesty's Justices of the Peace for the said District. That the said diseased red and white cow on complaint of Robert Headrick made under oath that upon reasonable inquiry no owner could be found, that said cow was liable to convey disease to his cattle, and upon examination by us, we the said Justices of the Peace, adjudge the said diseased red and white cow viz. large lump on jaw and fetid discharge in a very advanced stage. Therefore we order the destruction of said diseased cow, in accordance with form "C" of the Northwest Ordinance. The sum of $5.80 fee for examination and mileage, $5.00 for destruction total $10.80 to be paid from General funds of the Territories Ordinance 1889, "C" 18, sec. 2, 5. Given under our hands and seals the day and year first above mentioned and the conviction shall be good and effectual to all intents and purposes.

ALEX. S———, J. P. [Seal.]
A—— S———, J. P. [Seal.]

LINCOLN'S COUNSEL FEE.

The following will be of special interest to taxing-masters. It is a copy of the original in the Eden Musee Collection of Lincoln manuscripts in Chicago:

" *The Illinois Central Railway Company,*

To A. LINCOLN, Dr.

" To professional services in the case of the Illinois Central
" Railway Company against the County of McLean, argued
" in the Supreme Court of the State of Illinois, and decid-
" ed at December Term, 1855 - - - - - - - - - - - $5,000 00

" We, the undersigned members of the Illinois Bar, understanding " that the above-entitled cause was twice argued in the Supreme Court, " and that the judgment therein decides the question of the claim of " counties and other minor municipal corporations to tax the property " of said railroad company, and settles said question against said claim, " and in favor of said railroad company, are of opinion that the sum " above charged is not unreasonable.

(Sd.) " GRANT GOODRICH,
" N. B. JUDD,
" ARCHIBALD WILLIAMS,
" N. H. PURPLE,
" O. H. BROWNING,
" R. S. BLACKWELL."

GUILTY, OR NOT GUILTY?

A learned judge of French extraction, not of the Manitoba bench, lately pronounced, within five thousand miles of this city, the following remarkable sentence on a man accused of stealing a horse :

" Prisoner, de evidence is conflicting, but I find you " guilty and sentence you to dree months in de guard " room. De evidence, as I say, is very conflicting, but if " I was sure, if I was *quite* sure, dat you stole dat horse, I " would give you two years in de Manitoba Penitentiary !"

AN UNIQUE DOCUMENT.

The following document, under which title to Lot 22 of St. Peter's Parish is derived, filed in the Exchequer Court, Winnipeg, in the case of the *Queen* v. *Thomas* is sufficiently curious :

Nov. 16th, 1864.--Land sold to William Thomas by Robert Sandison. Three chains and a house. Witness, Thomas Belfor, Thomas Sandison, Edward Thomas, John Sinclair. The consideration is set out as follows :

	£	s.	d.
1 heifer	3	0	0
£1 cash	1	0	0
25½ pounds green meat		7	5¼
8 loads hay at 1s 6d		12	0
4 loads hay at 1s 3d		5	0
10 fish		2	6
1 load firewood		1	6
Load of a horse		1	3
£5 cash	5	0	0

	£	s.	d.
10 pounds pemican at 4½		3	9
Horse shoes and nails		5	3
Soap		1	0
Cash		1	3
Goods to the amount of		10	0
Cash paid down	2	2	0
	£15	0	0

Epitome of English Decisions.

This digest includes cases of interest reported in the periodicals since our last month's issue.

AGREEMENT.—Illegal consideration.—Where an agreement is entered into, with the approval of the Court, to repair certain roads, after the party covenanting is indicted, and the indictment is withdrawn in pursuance of the giving of the agreement, an action for specific performance will not lie, the consideration being illegal. *The Windhill Local Board* v. *Vint*; 89 L. T. 45.

ASSIGNMENT.—Where a debt collector obtained assignments of numerous small debts against a creditor and gave notice to the latter, the Court held that it was an abuse of the process of assignment and dismissed the action. *Comfort* v. *Betts*; 89 L. T. 80.

CAVEAT.—Power of Commissioner to refuse registration. A commissioner under secs. 19 and 21 of the Land Transfer Act 1874, Western Australia [the sections are set out in the case and are somewhat similar to secs. 47 to 53 of R. P. Act 1889], is not bound to register title (issue certificate), by reason of the issue of the prescribed notices and the non-appearance of a caveat, and he has a discretion to

refuse to register subject to the opinion of the Supreme Court under sec. 120 [sec. 118, R. P. Act 1889]. The sections are commented upon. *Manning* v. *Comm'r of Titles*; L. R. 15 P. C. 195.

COMPANY—Allotment of shares.—An allotment of shares in a company at a meeting of directors at which two directors out of four are present, and of which one director had not notice is invalid, but if at a validly constituted meeting the allotment is confirmed the subsequent ratification relates back and is valid. *Re Portuguese Co. Copper Mines Case*; 89 L. T. 80; 34 S. J. 488.

CONTRACT—Sale of lands—Mistake.—An error, entertained by one of the parties, to a contract of sale as to the legal meaning of the contract is insufficient to invalidate his consent to the same. *Stewart* v. *Kennedy*; L. R. 15 App. Cas. 108.

COMPANY—Liquidator.—Where a sheriff after a provisional liquidator is appointed, seizes the entrance monies of a theatre, he must return the same to such liquidator. *Re The Opera Company, Limited*; 89 L. T. 61.

ESTOPPEL—Fraud.—Where an Englishman dies possessed of shares in an American company, and his executors signed blank transfers with powers of attorney endorsed on the certificates and handed same to their London broker for transmission, but the latter fraudulently deposited them with certain banks as security for advances to himself, the question as between the banks and executors was decided by English, not American law, and the executors were held entitled to the shares. *Colonial Bank* v. *Cady*; 89 L. T. 41.

ILLEGAL CONTRACT.—Money paid under an illegal contract, which has been partially carried into effect, cannot be recovered back. *Kearley* v. *Thompson*; L. R. 24, Q. B. D. 742.

INJUNCTION.—An injunction will lie restraining one variety company from employing actors who are under a disabling contract to another company, even if the prior company were not a party to and had no knowledge of the contract. *The London Pavilion* v. *The Tivoli*; 89 L. T. 62.

JUSTICES—Conviction.—Where a by-law provides that no smoke, etc., shall be emitted from engines, so as to constitute any reasonable ground of complaint to the passengers or the public, and the defendant was convicted as having permitted smoke to escape contrary to the bye-law, without stating in terms any reasonable ground, etc., the conviction is bad. *Cotterill* v. *Lempriere*; L. R. 24 Q. B. D. 634.

LARCENY—Purse trick.—To obtain money by shewing the prosecutor a purse into which three shillings had apparently been dropped, and obtaining one shilling therefor, does not constitute larceny. *Reg.* v. *Solomons*; 89 L. T. 64.

LIBEL.—Where one edition of a paper is published in England and another in France (e. g. *The New York Herald*) such may properly be pleaded and evidence of the facts are admissable at the trial. *Whitney et al.* v. *Moignard*; L. R. 24 Q. B. D. 630.

NUISANCE—Thistles.—An occupier of land is under no duty towards his neighbor to periodically cut the thistles growing on his land, to prevent seeding, and no action will lie for seed blown on the adjoining land. *Giles* v. *Walker*; L. R. 24 Q. B. D. 656.

NUISANCE—Injunction.—A land owner who authorizes another to commit a nuisance, is responsible, although the act is committed by a licensee, and if he threatened or intended to authorize others to do such acts, he could be restrained by injunction. *Phillips* v. *Thomas*; 89 L. T. 45.

PATENT—Trade mark.—A comptroller is not bound to register a trade mark, which although not identical in form to one previously registered, is calculated to deceive. In re *Farrow's* application; 25 L. J. 70.

PRACTICE—Information and Summons.—A summons cannot be signed by a different magistrate from that before whom the information is laid and who grants the same, but does not sign it. Jarvis' Act, 11 and 12 Vic., c. 43, s. 1. *Dixon* v. *Wells*; 25 L. J. 71.

PRACTICE—Interrogatories.—A plaintiff cannot after the delivery of interrogatories by him, have the same struck out in part and leave others intact. *Samson* v. *Bailey*; 25 L. J. 71.

PRACTICE—Interrogatories—Privilege.—Where interrogatories are delivered to a town clerk who swears that the information he is in possession of, is obtained as solicitor in this very action, and claiming a privilege as such solicitor he will not be compelled to answer. *Corpor'n of Salford* v. *Lever*; L. R. 24 Q. B. D. 695.

PRACTICE—Interrogatories—An action brought under II Geo. 2, c. 19, s. 3, to recover double value of goods fraudulently removed to avoid a distress is a penal action, and interrogatories will not be administered to the defendant. *Hobbs* v. *Hudson*, 89 L. T. 64; 34 S. J. 491.

PRACTICE—New trial.—See ante p. 67, *Murtagh* v. *Barry*; L. R. 24 Q. B. D. 632.

PRACTICE—Solicitors lien.—Where the clients compromised an action without provision for costs, money in court was paid out to the solicitors under the Solicitors' Act 1860, s. 28, as property preserved. *Moxon* v. *Sheppard*; L. R. 24 Q. B. D. 627.

PRACTICE—Setting aside verdict.—A jury's verdict will not be disturbed as against evidence, or the weight of evidence, unless it is one which a jury viewing the whole of the evidence reasonably, could not properly find. *Phillips* v. *Martin*; L. R. 15 P. C. 193. (Issue under a R. P. Act appeal from N. S. Wales.)

RIPARIAN OWNERS RIGHTS.—A riparian owner is at liberty to construct and moor to his bank, a floating warf and boathouse, the same not being an obstruction to the navigation and is entitled to maintain an action for damages in respect thereof, caused by any unauthorized interference with the flow and purity of the stream. *Booth et al* v. *Ratte*. 11 Ontario Reports 491; L. R. 15 P. C. 188.

SALE OF GOODS—Implied warranty.—Where a manufacturer sells an article which he knows is bought for a

particular purpose, he impliedly warrants that it is fit for that particular purpose, but it is otherwise where the particular purpose is not mentioned to the seller. *Jones* v. *Padgett*; L. R. 24 Q. B. D. 650.

TRADE NAME.—Where the good will of a business is sold, although there is no express right given to use the vendor's name, yet it may be used if the latter is not exposed to liability by being held out as a person by whom contracts relating to the business were to be made. *Thynne* v. *Shove*; 89 L. T. 80; 34 S. J. 505.

CORRESPONDENCE.

DEFACING THE LAW SOCIETY'S BOOKS.

To the Editor of the Western Law Times:

DEAR SIR,—Several books in the Law Society's library are being marked in blue ink with the words "The Law Society of Manitoba." The stamp appears not only on the cover, but also on the title page and sometimes on a page in the middle of the work, and is certainly itself anything but neat. It is a pity that all the books should not be stamped by the binder, as has been usual, in gilt letters on the back.

Yours faithfully,

BARRISTER.

[NOTE—We agree with our correspondent. Quite irrespective of the damage done, nothing is so unsightly as a dull blue stamp displayed over a neatly printed title page. No doubt the matter will not occur again.—ED. W. L. T.]

THE

WESTERN LAW TIMES.

VOL. I. AUGUST 15, 1890. No. 5.

The Rise of Law in Rupert's Land.

(*Concluded.*)

3. What laws were introduced therein by the above provisions of the charter? (*cont'd.*)

Though the Canada Jurisdiction Act (1803) proved inoperative so far as the Company's territories were concerned, yet there are cases in the Indian Territories where its assistance was invoked, even as far as the other side of the Rocky Mountains; one notable instance (43) being that of the French-Canadian, La Pierre, who was transmitted to Canada for trial, charged with murder and cannibalism committed in British Columbia, near the source of the river of that name, in the spring of 1817.

Though so early as May 19, 1815, at a General Court of the Company held in London on that date, the appointment of a Governor-in-Chief of, and Council for, Rupert's Land had been authorized, as well as the appointment of sheriffs for the districts of Assiniboia and Moose, for the

(43) For an account of this melancholy occurence, see Ross Cox, Columbia River, vol. ii, p. 159, *et seq.* Mr. Forin, writing in the *Canadian Law Times* for June, p. 126, says he was unable to find "a single instance where the Eastern Courts were called upon to exercise their extraordinary statutory jurisdiction." His attention has evidently not been called to this, owing doubtless to the rarity of the work.

execution of all process according to law (44); and though the Governor and Council appointed thereunder did, on Feb. 12, 1835, while convened at Fort Garry, make provision for the sitting of "the Court of Governor and Council in its judicial capacity" four times a year, yet it was not until the advent of Recorder Thom in the spring of 1839, that the General Quarterly Court was formally and regularly established. This assertion may be justified by the remarks of Hargrave, who states (45) that "The recordership was instituted, along with the court to which the office is attached, in 1839. Before that date the few unimportant cases which arose were decided by the Governor as arbiter." We have moreover, as if on purpose to refute the claim of an earlier establishment of the court which has been advanced by some, no less an authority in support of our view than the statement and recommendation of Sir George Simpson, who in writing to Mr. Pelly on February 1, 1837, (46) says that "the time has come when it is no longer safe to trust the peace of the settlement solely to the good-will of its inhabitants. I, therefore, consider it highly necessary to the security of lives and property, that a court of justice, for the trial of civil and criminal cases, with an efficient police to support the civil power should be established." It is manifest that had the court been established in 1835, it would not have been necessary for Sir George, writing two years later, to again counsel its establishment. The control exercised by the company over the Indian Territories as distinguished from Rupert's Land, was derived from the Royal Licences of 1821 and 1838, before mentioned. The first of the above Licences, dated 6th December, was made to the company

(44) Resolution of the General Court. [Appendix to Narrative of Occurences, etc., 1817.

(45) Hargrave's Red River, p. 87.

(46) Correspondence regarding H. B. Co., London, 1842. Parliam. Papers, p. 17.

in conjunction with "William McGillivray, of Montreal, in the Province of Lower Canada, esquire, Simon McGillivray, of Suffolk-lane, in the City of London, merchant, and Edward Ellice, of Spring-Gardens, in the County of Middlesex, esquire; . . . who subsequently surrendered their interest to the company" (47). This license in addition to confirming the exclusive trade to the above grantees, who had entered into an agreement on the 26th of March previous, for the purpose of putting an end to competition and carrying on such exclusive trade, imposed the following regulations on the grantees for the preservation of law and order in the Territories: That accurate registers should be kept of all employees and accurate duplicates thereof be furnished yearly to the Secretary of State; that security should be given in the penal sum of 5,000l. for ensuring, as far as in the grantees lay, or as they could command by their authority over their employees, the due execution of all criminal processes, and of every civil process in every suit where the matter in dispute did not exceed 200l., and for the producing or delivering into custody for purposes of trial all persons in their employ or acting under their authority who should be charged with any criminal offence; the trade not be exercised to the prejudice or exclusion of any citizen of the United States engaged therein to the Westward of the Stoney (Rocky) Mountains. This grant was renewed on May 30, 1838, for 21 years, but was not further renewed after the expiration of that term though the committee of 1857 reported (48) that "it is desirable that they (the company) should continue to enjoy the privilege of exclusive trade, which they now possess, except so far as those privileges are limited by the foregoing recommendations." The grant, so far as it related to British Columbia, was revoked on

(47) Letter, Gov. Pelly to Lord Stanley. Par. Pap., 1842, p. 3.

(48) Par. Report, 1857, p. iv.

September 2, 1858 (49). It may be mentioned that the company refused the offer of an extension of the license for one, or for two years. The number of cases transmitted to Canada under the Licence were few. Sir George Simpson states that there were but two in his time. One of these cases was the removal of three parties who were concerned in a murder, all "the way from Mackenzie's River at great difficulty and great expense. . . . In many instances we have brought cases to Red River, where the parties have been regularly tried by a jury." (50) After the arrival of Recorder Thom the administration of justice was carried out in a regular and, considering conflicting interests, fairly impartial manner. Petty juries *had* occasionally been impanneled before the arrival of the Recorder, apparently at irregular and uncertain intervals.

The first one which sat, April 28, 1836, found Louis St. Denis, a French-Canadian, guilty of theft, and he was, in addition to other punishment, sentenced to be flogged. In looking back on the riot which followed the execution of this sentence (51) it is interesting to note that this, the first public flogging that took place as above, and the last one, that of the prisoner McCormack in the Eastern Judicial District Jail in Winnipeg, about a half century afterwards, were both the signals for a popular uprising. The laws as administered by Recorder Thom were, as would be supposed, those which existed in England at the date of the charter when applicable to the colony. Alexander Ross, sheriff of Assiniboine, appointed in 1835, is particular to mention this fact (52), and he is corroborated in this statement by the evidence of Sir George Simpson and others before the Parliamentary committee of 1857.

---

(49) See copy of this instrument in Par. Papers, 1859, p. 21.

(50) Report of 1857, p. 59. *V.* also trials at Three Rivers in 1838.

(51) Ross' Red River Settlement, p. 186-7.

(52) *Ibid.*, p. 383. *V.* also Recorder Johnson's charge to the first Grand Jury of Manitoba, May 16, 1871, to the same effect.

Justice was in fact administered on these principles till the time of the transfer of Rupert's Land to Canada by the Order-in-Council of 23 June, 1870, taking effect on the 15th day of July of that year in pursuance of the Imperial Act, 31 and 32 Vic., cap. 105, called "The Rupert's Land Act 1868."

Exceptions had been taken as early as 1874, to the constitution of this General Court of Assiniboia in the famous case of *Queen* v. *Ambroise Lepine*, where the prisoner's counsel entered a plea to the jurisdiction of the court, to which the Crown demurred. The demurrer was upheld by Chief Justice Wood, who delivered the judgment, often herein referred to, which is a most able and exhaustive one, discussing the question most fully from all points of view.

"The sole authority and basis of this court and its officers," says the Chief Justice, (53) "rested upon the powers conferred on the Company by the charter granted it in the reign of King Charles the Second, but on no legislative enactment whatever. . . . . It would therefore appear that this Court, with its judges and officers in 1870 had been in existence for thirty years, trying civil cases to any amount whatever and exercising criminal jurisdiction even to the extent of inflicting capital punishment (for in one instance at least a person was tried for murder, convicted and executed) (54), without its basis or jurisdiction ever having been formally and authoritatively questioned by the Imperial Government. On the contrary, by the last clause of "Rupert's Land Act 1968," the validity of this Court and the legality of its jurisdiction over capital offences, which were then well known to the Government and Parliament of England . . . . and of its officers,

(53) *Queen* v. *Lepine*, p. 27.

(54) This refers to the execution of a Saulteaux Indian, hung at Fort Garry on Sept. 6, 1845, for the double murder of a Sioux and a Saulteaux.

and of the magistrates and justices then being in Rupert's Land, seem to be fully recognized and admitted." It will be remembered that as already mentioned ante p. 79, 1 and 2 Geo. IV., cap. 66, (1821) gave to the courts of Canada *a concurrent* civil and criminal jurisdiction over the Hudson's Bay and Indian Territories and made certain provisions for the establishment of Courts of Record, etc., but none were so constituted under the authority of the Act nor did the courts of Canada in any known case ever exercise any jurisdiction concurrent or otherwise over the company's territories after the passage of the Act giving them authority so to do. If by chance there should be a case of this sort after the passing of the Act and before the establishment of the Courts at Red River, there is assuredly not an instance after that event, for the whole course of legal administration was left solely to the company's courts. The preamble of Imp. Act 22 and 23 Vic., c. 26, in fact recites that "no Courts of Record had been established or authorized as provided in the Act 1 and 2 Geo. IV., cap. 66," and proceeded to make provisions for the appointment of justices of the peace for the Indian Territories and laid down forms of procedure, the last clause, however, of the Act specially declaring that its provisions did not extend to the territories heretofore *granted* to the company. Chief Justice Sir F. G. Johnson in his Report (55) on the Laws of Manitoba says, "no Justices had been appointed (under the Act of 1821), and no Courts of Record established by the Crown, nor had the Governor of Lower Canada ever appointed any Commissioners to execute the processes of the Canadian Courts, and therefore it became necessary to make provision for the Indian Territories that were not included in the limits of the Charter, leaving to the courts established by the Hudson's Bay Company in

(55) Report on the State of the Laws in Force in Manitoba up to the 15th of July, 1870. *V.* also charge to Grand Jury ante, where he states, referring to the charter: "We derive our laws, gentlemen, from very ancient sources, which have received very recent sanction, etc., etc."

their territories the authority and jurisdiction that belongs to them."

It is sufficiently interesting to note that in the above report of the Chief Justice he arrived at the same decision in regard to the effect of the Ordinances of the 11th April, 1862, and 7th January, 1864, passed by the Council of Assiniboia, as did the Court of Queen's Bench here in *Sinclair* v. *Mulligan*, (56) unconsciously no doubt, some eighteen years later, without apparently having been aware of this most valuable and able report as it is not even referred to by the Court in its judgment. The report proceeds as follows: "It is obvious that the language of either and both these enactments is inadequate to extend the laws of England of either of the periods therein mentioned to the rights and obligations of the inhabitants; the express terms, both of the one and of the other, being restricted to the regulations of the proceedings of the court."

The Supreme Court of Manitoba, now the Court of Queen's Bench, was established by Man. Stat. 34 Vic., cap. 2, (3rd May, 1871,) but was not organized and brought into operation till the appointment of a Chief Justice, which in fact did not take place till the appointment of Hon. Alex. Morris in 1872 (57). By the Rupert's Land Act, 1868, the jurisdiction of the General Court of Assiniboia was continued till 15th July, 1870, the date of the transfer and of the birth of the new Province of Manitoba. Between this date and the first sitting of the Supreme Court as above mentioned, which took place in Winnipeg in the fall of 1872, this General Court prevailed, 34 Man., cap. 2, sec. 39, specially recognizing the court and directing that is should "exercise throughout the Province all the functions and possess all the authority hereby conferred on the Supreme Court, etc," (58). The Canadian Parlia-

(56) 5 Man. Rep., p. 17.

(57) The Chief Justice took the oath of office on August 14, 1872.

(58) *Vide*, also ss. 40 and 41. *V.* also 32-33 V. c. 3, and 33 V. c. 3, s. *36*.

ment also, on the 14th April, 1871, passed 34 Vic., cap. 14, extending to the Province certain of the criminal laws then in force in the other Provinces. The second section declared that "the Court known as the General Court heretofore existing in the Province of Manitoba . . . . shall have power to hear, try and determine in due course of law all treasons, felonies, etc., ... committed in any part of the said Province, etc. . . . ."

The legal fate of the Indian Territories was determined by the 35th section of the Manitoba Act which provided that "such portion of Rupert's Land and the Northwest Territory, as is not included in the Province of Manitoba," should be called the "North-West Territories" and be governed by the Lieut.-Gov. of the Province of Manitoba. who should hold a concurrent commission as Lieut.-Gov. of the same. The subsequent legal history of Rupert's Land, now divided into so many territories and districts, is so well known to our readers that it would be more than idle to refer to it.

In spite of all that has been written on this country, we cannot but feel that she still awaits the pen of the true historian to awake to life her romantic history, and we are of opinion that the remark of Mr. Keating (59) made over sixty years ago, that "the history of Red River would, if correctly and impartially written, offer many useful lessons," holds good to the present day (60).

---

(59) Keating, Expedition to St. Peter's River, Lake of the Woods, etc., vol. ii, p. 62, 1825.

(60) It would be interesting to know upon what ground is based the right to the title of "Honourable" so often applied to the Hudson's Bay Company and accorded to them by even their adversaries. (See *inter alia* the journals of Harmon and Henry.) We have not, to our recollection, ever seen this prefix applied to them in any parliamentary reports or State communications. It would appear probable that the use of the word is founded upon their Royal Charter, and yet even then

NOTES AND COMMENTS.

IS THIS JUSTICE?

In the May number of this journal, under the title of "Criticism of the Bench," while noticing in particular the attacks of the English Press on the Lord Chancellor of England, we took occasion to remark that "that legal journal, which, while professing to be actuated by motives for the common weal, would hesitate to denounce the wrongful, arbitrary, or injudicious acts of any Judge no matter how high his station, would richly merit the desdain and contempt of any member of the Bar."

We have not the complaint against our judges that certain of the most influential London journals, headed by the *Morning Post*, have been strongly urging of late against the English judges—that of laziness and delay in rendering decisions; on the contrary, we have now before us a case, in regard to which we feel sure that, had the Full Court taken more time to reflect, they would not have rendered such a decision as they did in the suit of *Miller* v. *McCuaig*, reported on p. 110 of the present number of this journal. However much we feel disinclined to pass strictures upon the findings or decisions of the Court of Queen's Bench of this Province in which we practice, yet on this occasion we are convinced that we have a duty to perform in calling the attention of the public, and the profession, to the judgment given in this case, and especially as we have been

---

the use would not be as of right as the charter does not style the Company "The *Honourable* the Governor and Company, etc." Possibly the exalted station of Prince Rupert may have led to the bestowal of the title. We have not in our possession a copy of the charter of the East India Company to compare with that of the H. B. Co. in this respect.

requested to do so by many gentlemen also practicing at the Bar of this Court. We have been most careful to state fully the facts of the case in order that there might be no misapprehension or mistake in the matter, and they are shortly as follows:

The defendant in the suit appealed from an order made by the Chief Justice and the appeal was entered on the list of appeals for Easter term and stood over by consent till next term, *no objections being taken to the regularity of the appeal.* When the matter came up for argument in the succeeding term, the case was taken up and proceeded with. Counsel for the appellant opened the matter, and having entered upon his argument was stopped, not by the opposing Counsel *but by the Court*, and objection taken by the Court that the copies before the Judges were not sworn copies. On this frivolous objection—which we submit is not a valid one, as the rule of Court does not call for a "sworn copy" or "copy verified by affidavit," but simply "copy,"—the appeal was dismissed with costs. It is true, as it now appears, that on a few prior occasions the same course had been followed, but the Bar, as a whole, had no knowledge of such a decision. We are of the opinion that the correct course to pursue is not to require sworn copies but simply "copies," as called for by the rules, and if it should appear at the hearing that the attorney has not furnished "copies" then let him bear the consequences of his mistake. It is preposterous, not to say insulting, to presume that any solicitor, an officer of the Court, would attempt to deceive the Court.

In this instance, the defendants counsel applied next day under rule 66, allowing amendments, for an order to re-instate the case on the list, and furnished such material on the application (see report) as ought undoubtedly to have entitle his client to this proceeding; that is, unless section 66 is be considered as a mere dead letter. We regret to say that

the Judges also dismissed this motion with costs and as the time had elapsed for the entering of the appeal, the unfortunate suitor was actually debarred from a hearing on appeal in the courts. Not even the poor defence of "an unimportant matter" can be urged in extenuation of such a deplorable result, as the matters in dispute in this case are of exceptional interest to the community at large; having a most important bearing on the rights of mortgagees throughout this Province.

We cannot too strongly deprecate the willingness, not to say eagerness, displayed by the judges to seize upon such a point, one quite beneath the dignity of Her Majesty's Courts of Justice. Had the objection been taken by the opposing Counsel, the Attorney-General, and had the objection been upheld by the Court, we would have said that it was bad enough in all conscience. What shall we then say of the Court itself seeking to shut its doors in the face of the litigant taxed to support and maintain it as the fountain of justice?

There are other matters in connection with the administration of justice in the Court of Queen's Bench that we might conscientiously have referred to ere now, but this instance it would be wrong to allow to pass unnoticed. Such is the general feeling that a miscarriage of justice has taken place in this matter, that we are informed, on most reliable authority, that steps will be taken at the next session of the legislature so as to make it impossible for such a fiasco again to result, and to provide that all mistakes and errors of this nature shall be merely reduced to a question of costs.

We turn with a feeling of relief from the contemplation of such a lamentable reversion to the dark ages of legal history by a Court of Justice in this Province, to the high and enlightened views of the Lord Chief Justice of England on just such matters, which are most ably and enter-

tainingly discussed in his recent instructive article on "The Law in 1847 and the Law in 1889" in the *Contemporary Review* for June last. In order to bring prominently before our readers the broad and liberal views of the Lord Chief Justice, and the horror he has of the exercise of undue technicality by a Court of Justice we take the liberty of reprinting his scathing sketch of the celebrated Baron Parke, who fostered technicality to such an extent that he almost stifled Justice as an element in the common Law of England.

"The ruling power of the Courts in 1847 was Baron Parke, a man of great and wide legal learning, an admirable scholar, a kind-hearted and amiable man, and remarkable force of mind. These great qualities he devoted to heightening all the absurdities, and contracting to the very utmost the narrowness of the system of special pleading. The client was unthought of. Conceive a judge rejoicing, as I have myself heard Baron Parke rejoice, at nonsuiting a plaintiff in an undefended cause, saying, with a sort of triumphant air, that 'those who drew loose declarations brought scandal on the law'! The right was nothing, the mode of stating everything. When it was proposed to give power to amend the statement, 'Good Heavens'! exclaimed the Baron, 'think of the state of the Record'!—i.e., the sacred parchment, which it was proposed to defile by erasures and alterations. He bent the whole powers of his great intellect to defeat the Act of Parliament which had allowed of equitable defences in a Common Law action. He laid down all but impossible conditions, and said with an air of intense satisfaction, in my hearing, 'I think we settled the new Act to-day, we shall hear no more of Equitable defences'! And as Baron Parke piped, the Court of Exchequer followed, and dragged after it, with more or less reluctance, the other Common Law Courts of Westminister Hall. Sir William Maule and Sir Cresswell Cresswell did their best to resist the current . . . . ." Lord Chief Justice Campbell "for some time struggled in vain against the idolatry of Baron Parke to which the whole of the Common Law at that time was devoted...One of the objections he was very near conferring on it (the Common Law) was its absolute obligations. 'I have aided in building up sixteen volumes of Meeson & Welsby,' said he proudly to Charles Austin, 'and that is a great thing for any man to say'....He repeated his boast to Sir William Erle. 'It's a lucky thing,' said Sir William (to him), as he told me himself, 'that there was not a seventeenth volume, for if there had been the Common Law itself would have disappeared altogether, amidst the jeers and hisses of mankind."!

STUDENTS' EXAMINATIONS.

It is a matter for regret that dissatisfaction exists, and has for some time existed, amongst the students-at-law and articled clerks at the way the late examinations were conducted by the senior examiner. This gentleman undoubtedly does not enjoy the confidence or respect of the students or clerks, who have many objections to the papers he sets, and at least one complaint has already been preferred against him to the Law Society.

The benchers should, and doubtless will, at their next meeting enquire searchingly into this matter and remove all causes of complaint. Questions asked by this examiner have been shown to us, and we have no hesitation in saying that some of them are preposterous in the extreme, fully justifying the objections taken. The questions set, should in our opinion, be published after the examinations are ended.

LIBRARY ACCOMODATION.

The profession will be glad to hear that the New Brunswick, Nova Scotia, Prince Edward Island, and British Columbia reports have arrived, and are now in position on the shelves of the library. Strange to say, in spite of the now almost historical report of the library committee to the effect that every inch of available space had been occupied, it was not found necessary to enlarge the building or even the shelves for this purpose, in fact there is still ample room for more volumes and had this space been properly utilized, the Court of Queen's Bench would not have been obliged to practically reverse its decision *re Ashbaugh* within a few months, for want of proper foresight on the part of the library committee in completing the files of the reports, in spite of the large surplus of nearly $23,000 to the Society's credit. It will be of interest to the profession to know that access can be had to the library in the evening by applying to the Court

tainingly discussed in his a salary of $10 a month
"The Law in 1847 and
Contemporary Review fo
prominently before our
of the Lord Chief Ju the bar might fairly be of the
exercise of undue profession, to say nothing of the
take the liberty nough to bear with in the present
celebrated Baro rtain course of legal proceedings in
an extent that nty Courts. There was however a sort
the common he thought that matters might eventually

"The ru nearly right, on appeal, if expense were no
great and w reference to the case of *Winnipeg Water*
amiable m *Winnipeg Street Railway Co.*, reported on
devoted how that even this indifferent *solatium* no
utmost
was u The result of that case is to practically leave
Baro
sayi wer of the County Judge to say whether there
ati an appeal or not from his own verdict. This is
of intolerable not to say outrageous, and we do not
to say, in the light of past experiences, that it will
be productive of much injustice to suitors in the County
Court who are already badly enough off in this respect.
We suggest as a remedy that a reporter should be furnished by the government who would be in attendance at all trials in the County Court, on either party giving notice to that effect a reasonable time in advance, and who could take all the evidence adduced. The judge would then be bound to give a proper certificate and return "all the evidence," and not that "in substance" which latter means in plain English, just what he chooses to take down. Suitors would then have some feeling of security in the procedure and manner of trying cases in these courts, which we propose to notice on a future occasion.

To provide a reporter would be but fair to the judges, who now have often to take down, in addition to the notes a judge would make in any event, a great mass

-is unjustly entailing on them the double reporter.

CLAIMS.

- 17th of July last, a deputation of the Bar, of about fifteen gentlemen, including the Hon. y-General, waited upon the Hon. Mr. Dewdney, inister of Interior, at the office of the Dominion Lands mmissioner here. The object in view was to have the iles of evidence, covering claims under this Act, forwarded from Ottawa to the Land Titles offices in Manitoba when required, upon the simple requisition of the district registrar. Mr. Thos. Robinson, addressed the Minister pointing out the inconveniences which now existed, and was followed by Mr. E. D. Carey, deputy district-registrar, of Winnipeg, and other gentlemen, in the same strain. The Minister, after some discussion with his deputy, Mr. Burgess, and the gentlemen present, expressed his intention of carrying out the request of the Bar, experimentally, for some time at least.

House caretaker, who is receiving a salary of $10 a month for this purpose.

COUNTY COURT APPEALS.

Any member of the bar might fairly be of the opinion that the legal profession, to say nothing of the public, had already enough to bear with in the present precarious and uncertain course of legal proceedings in certain of the County Courts. There was however a sort of consolation in the thought that matters might eventually be put right, or nearly right, on appeal, if expense were no object, but a reference to the case of *Winnipeg Water Works Co.* v. *Winnipeg Street Railway Co.*, reported on p. 109 will show that even this indifferent *solatium* no longer exists. The result of that case is to practically leave it in the power of the County Judge to say whether there shall be an appeal or not from his own verdict. This is really intolerable not to say outrageous, and we do not hesitate to say, in the light of past experiences, that it will be productive of much injustice to suitors in the County Court who are already badly enough off in this respect. We suggest as a remedy that a reporter should be furnished by the government who would be in attendance at all trials in the County Court, on either party giving notice to that effect a reasonable time in advance, and who could take all the evidence adduced. The judge would then be bound to give a proper certificate and return "all the evidence," and not that "in substance" which latter means in plain English, just what he chooses to take down. Suitors would then have some feeling of security in the procedure and manner of trying cases in these courts, which we propose to notice on a future occasion.

To provide a reporter would be but fair to the judges, who now have often to take down, in addition to the notes a judge would make in any event, a great mass

of evidence, thus unjustly entailing on them the double duty of judge and reporter.

MANITOBA ACT CLAIMS.

On the 17th of July last, a deputation of the Bar, consisting of about fifteen gentlemen, including the Hon. Attorney-General, waited upon the Hon. Mr. Dewdney, the Minister of Interior, at the office of the Dominion Lands Commissioner here. The object in view was to have the files of evidence, covering claims under this Act, forwarded from Ottawa to the Land Titles offices in Manitoba when required, upon the simple requisition of the district registrar. Mr. Thos. Robinson, addressed the Minister pointing out the inconveniences which now existed, and was followed by Mr. E. D. Carey, deputy district-registrar, of Winnipeg, and other gentlemen, in the same strain. The Minister, after some discussion with his deputy, Mr. Burgess, and the gentlemen present, expressed his intention of carrying out the request of the Bar, experimentally, for some time at least.

House caretaker, who is receiving a salary of $10 a month for this purpose.

COUNTY COURT APPEALS.

Any member of the bar might fairly be of the opinion that the legal profession, to say nothing of the public, had already enough to bear with in the present precarious and uncertain course of legal proceedings in certain of the County Courts. There was however a sort of consolation in the thought that matters might eventually be put right, or nearly right, on appeal, if expense were no object, but a reference to the case of *Winnipeg Water Works Co.* v. *Winnipeg Street Railway Co.*, reported on p. 109 will show that even this indifferent *solatium* no longer exists. The result of that case is to practically leave it in the power of the County Judge to say whether there shall be an appeal or not from his own verdict. This is really intolerable not to say outrageous, and we do not hesitate to say, in the light of past experiences, that it will be productive of much injustice to suitors in the County Court who are already badly enough off in this respect. We suggest as a remedy that a reporter should be furnished by the government who would be in attendance at all trials in the County Court, on either party giving notice to that effect a reasonable time in advance, and who could take all the evidence adduced. The judge would then be bound to give a proper certificate and return "all the evidence," and not that "in substance" which latter means in plain English, just what he chooses to take down. Suitors would then have some feeling of security in the procedure and manner of trying cases in these courts, which we propose to notice on a future occasion.

To provide a reporter would be but fair to the judges, who now have often to take down, in addition to the notes a judge would make in any event, a great mass

of evidence, thus unjustly entailing on them the double duty of judge and reporter.

MANITOBA ACT CLAIMS.

On the 17th of July last, a deputation of the Bar, consisting of about fifteen gentlemen, including the Hon. Attorney-General, waited upon the Hon. Mr. Dewdney, the Minister of Interior, at the office of the Dominion Lands Commissioner here. The object in view was to have the files of evidence, covering claims under this Act, forwarded from Ottawa to the Land Titles offices in Manitoba when required, upon the simple requisition of the district registrar. Mr. Thos. Robinson, addressed the Minister pointing out the inconveniences which now existed, and was followed by Mr. E. D. Carey, deputy district-registrar, of Winnipeg, and other gentlemen, in the same strain. The Minister, after some discussion with his deputy, Mr. Burgess, and the gentlemen present, expressed his intention of carrying out the request of the Bar, experimentally, for some time at least.

House caretaker, who is receiving a salary of $10 a month for this purpose.

COUNTY COURT APPEALS.

Any member of the bar might fairly be of the opinion that the legal profession, to say nothing of the public, had already enough to bear with in the present precarious and uncertain course of legal proceedings in certain of the County Courts. There was however a sort of consolation in the thought that matters might eventually be put right, or nearly right, on appeal, if expense were no object, but a reference to the case of *Winnipeg Water Works Co.* v. *Winnipeg Street Railway Co.*, reported on p. 109 will show that even this indifferent *solatium* no longer exists. The result of that case is to practically leave it in the power of the County Judge to say whether there shall be an appeal or not from his own verdict. This is really intolerable not to say outrageous, and we do not hesitate to say, in the light of past experiences, that it will be productive of much injustice to suitors in the County Court who are already badly enough off in this respect. We suggest as a remedy that a reporter should be furnished by the government who would be in attendance at all trials in the County Court, on either party giving notice to that effect a reasonable time in advance, and who could take all the evidence adduced. The judge would then be bound to give a proper certificate and return "all the evidence," and not that "in substance" which latter means in plain English, just what he chooses to take down. Suitors would then have some feeling of security in the procedure and manner of trying cases in these courts, which we propose to notice on a future occasion.

To provide a reporter would be but fair to the judges, who now have often to take down, in addition to the notes a judge would make in any event, a great mass

of evidence, thus unjustly entailing on them the double duty of judge and reporter.

MANITOBA ACT CLAIMS.

On the 17th of July last, a deputation of the Bar, consisting of about fifteen gentlemen, including the Hon. Attorney-General, waited upon the Hon. Mr. Dewdney, the Minister of Interior, at the office of the Dominion Lands Commissioner here. The object in view was to have the files of evidence, covering claims under this Act, forwarded from Ottawa to the Land Titles offices in Manitoba when required, upon the simple requisition of the district registrar. Mr. Thos. Robinson, addressed the Minister pointing out the inconveniences which now existed, and was followed by Mr. E. D. Carey, deputy district-registrar, of Winnipeg, and other gentlemen, in the same strain. The Minister, after some discussion with his deputy, Mr. Burgess, and the gentlemen present, expressed his intention of carrying out the request of the Bar, experimentally, for some time at least.

House caretaker, who is receiving a salary of $10 a month for this purpose.

COUNTY COURT APPEALS.

Any member of the bar might fairly be of the opinion that the legal profession, to say nothing of the public, had already enough to bear with in the present precarious and uncertain course of legal proceedings in certain of the County Courts. There was however a sort of consolation in the thought that matters might eventually be put right, or nearly right, on appeal, if expense were no object, but a reference to the case of *Winnipeg Water Works Co.* v. *Winnipeg Street Railway Co.*, reported on p. 109 will show that even this indifferent *solatium* no longer exists. The result of that case is to practically leave it in the power of the County Judge to say whether there shall be an appeal or not from his own verdict. This is really intolerable not to say outrageous, and we do not hesitate to say, in the light of past experiences, that it will be productive of much injustice to suitors in the County Court who are already badly enough off in this respect. We suggest as a remedy that a reporter should be furnished by the government who would be in attendance at all trials in the County Court, on either party giving notice to that effect a reasonable time in advance, and who could take all the evidence adduced. The judge would then be bound to give a proper certificate and return "all the evidence," and not that "in substance" which latter means in plain English, just what he chooses to take down. Suitors would then have some feeling of security in the procedure and manner of trying cases in these courts, which we propose to notice on a future occasion.

To provide a reporter would be but fair to the judges, who now have often to take down, in addition to the notes a judge would make in any event, a great mass

of evidence, thus unjustly entailing on them the double duty of judge and reporter.

MANITOBA ACT CLAIMS.

On the 17th of July last, a deputation of the Bar, consisting of about fifteen gentlemen, including the Hon. Attorney-General, waited upon the Hon. Mr. Dewdney, the Minister of Interior, at the office of the Dominion Lands Commissioner here. The object in view was to have the files of evidence, covering claims under this Act, forwarded from Ottawa to the Land Titles offices in Manitoba when required, upon the simple requisition of the district registrar. Mr. Thos. Robinson, addressed the Minister pointing out the inconveniences which now existed, and was followed by Mr. E. D. Carey, deputy district-registrar, of Winnipeg, and other gentlemen, in the same strain. The Minister, after some discussion with his deputy, Mr. Burgess, and the gentlemen present, expressed his intention of carrying out the request of the Bar, experimentally, for some time at least.

House caretaker, who is receiving a salary of $10 a month for this purpose.

COUNTY COURT APPEALS.

Any member of the bar might fairly be of the opinion that the legal profession, to say nothing of the public, had already enough to bear with in the present precarious and uncertain course of legal proceedings in certain of the County Courts. There was however a sort of consolation in the thought that matters might eventually be put right, or nearly right, on appeal, if expense were no object, but a reference to the case of *Winnipeg Water Works Co.* v. *Winnipeg Street Railway Co.*, reported on p. 109 will show that even this indifferent *solatium* no longer exists. The result of that case is to practically leave it in the power of the County Judge to say whether there shall be an appeal or not from his own verdict. This is really intolerable not to say outrageous, and we do not hesitate to say, in the light of past experiences, that it will be productive of much injustice to suitors in the County Court who are already badly enough off in this respect. We suggest as a remedy that a reporter should be furnished by the government who would be in attendance at all trials in the County Court, on either party giving notice to that effect a reasonable time in advance, and who could take all the evidence adduced. The judge would then be bound to give a proper certificate and return "all the evidence," and not that "in substance" which latter means in plain English, just what he chooses to take down. Suitors would then have some feeling of security in the procedure and manner of trying cases in these courts, which we propose to notice on a future occasion.

To provide a reporter would be but fair to the judges, who now have often to take down, in addition to the notes a judge would make in any event, a great mass

of evidence, thus unjustly entailing on them the double duty of judge and reporter.

MANITOBA ACT CLAIMS.

On the 17th of July last, a deputation of the Bar, consisting of about fifteen gentlemen, including the Hon. Attorney-General, waited upon the Hon. Mr. Dewdney, the Minister of Interior, at the office of the Dominion Lands Commissioner here. The object in view was to have the files of evidence, covering claims under this Act, forwarded from Ottawa to the Land Titles offices in Manitoba when required, upon the simple requisition of the district registrar. Mr. Thos. Robinson, addressed the Minister pointing out the inconveniences which now existed, and was followed by Mr. E. D. Carey, deputy district-registrar, of Winnipeg, and other gentlemen, in the same strain. The Minister, after some discussion with his deputy, Mr. Burgess, and the gentlemen present, expressed his intention of carrying out the request of the Bar, experimentally, for some time at least.

FLOTSAM AND JETSAM.

HOW LINCOLN PREPARED HIS CASE.

The notes here given are taken *verbatim* from the originals prepared by Lincoln, which are now in the Eden Musee, Chicago. The clearness and conciseness of arrangement must commend itself to the most casual observer.

LEONARD H. MICKY & OTHERS *vs.* BENJAMIN S. PETTYBONE & OTHERS.	Admitted in the answer that James Baily and Samuel P. Baily owned the lots, and conveyance to them in trust, to Daniel M. Baily.

Prove the power of attorney from D. M. Baily to J. R. Stanford by production of same attached to Stanford's deposition and indentification and execution of same by said deposition.

Prove deed from Stanford to Peter Menard Jr. and R. S. Doolittle, by copy of record in recorders office and by Stanford's deposition.

Prove that Stanford received the consideration from Menard and Doolittle by Stanford's deposition.

Prove that D. M. B. had notice of the sale of the lots and without objection received the purchase money, by Stanford's deposition corroborated by Menard's deposition.

Prove that Menard & Doolittle took possession of the lots about the date of Stanford's deed to them, and with those holding under them have had posssesion ever since and have made valuable improvements by ——.

Prove that they, and not D. M. B. paid the taxes all the while.

Admitted in the answer.....

[Here the manuscript abruptly ends.]

A SONG OF USES.

The following quaint and clever production of Mr. Challis is taken from the *Law Quarterly Review* for July, 1890. We regret that we cannot reproduce it in the beautiful black letter that the publishers of that great review delight their readers with:

A SONG OF USES.

THE OLD AND THE NEW.

I.

Magic wordes! ye, I wis, are a touchstone of noses
Mete to discerne between hawk and hernshawe;
A limitless theme, that is more than red roses
To monger of sonnet and rhyming gew-gaw;
Sage Caius, a Mind that defies competition,
Ne'er dreamt of that Maxim, so soothfast and true:
IF THE LAND TO THE FEOFFOR REVERTS BY CONDITION,
HE'S IN OF THE OLDE USE AND NOT OF THE NEW.

II.

Give ear, O ye Shades of Lycurgus and Moses!
I rede ye a riddle the like ye ne'er saw;
('Tis a wonder how well your Lawmaker composes
A Code without knowing a fragment of Law:
Nor Spartan nor Hebrewe had any suspicion
Or hint of the things I unfold to their view:)
NO REMAINDER IS LIMITED WELL ON CONDITION,
WHICH RESTORES THE OLDE USE BY DESTROYING THE NEW.

L'Envoi.

Ye Poets! I'm sick of your vain repetition,
Your Jenny and Jessamy, Sukey and Sue:
Be advised and for Ballades suggesting vomition,
Give us Sonnets of
USES, THE OLDE AND THE NEW.

H. W. C.

AN AMUSING ERROR.

The editor of one of our legal exchanges must have been mountaineering during the vacation and became affected by his environment. Evidence of the influence of his surroundings will be found in a laughable mis-use of poetical expressions while reviewing a solemn legal work lately issued. He thus proceeds: "From its *source to its* "*summit*, from the days of its interference with the rigid "course of law to the days of its final triumph by means "of the Judicature Act, the history of Equity is written in "concise and entertaining form. . . . . ."

TERM BRIEFS.

TRINITY TERM.

Mr. Justin Edward Porter was called to the Bar.

Mr. William Forsyth McCreary was admitted as an attorney.

Epitome of English Decisions.

COMPANY—Illegal contract.—It is not illegal to take shares or tickets in a foreign lottery, or to form a company to do so. *Macnee* v. *Persian Investment Co.*; 44 Ch. D. 306.

COMPENSATION.—A plaintiff is not bound, in order to sustain a verdict giving compensation in respect of land, compulsory taken for public purposes where coal thereunder is assessed to him, to prove by costly experiments the mineral contents of his land, and even if a seam of coal is not presently workable, compensation may be given for it if it is likely to be worked in the future. *Brown* v. *Commissioner Rys.* N. S. Wales; 15 App. Ca. 240.

CONTRACT—Illegality.—Where there has been a partial carrying into effect of an illegal purpose in a substantial manner, and something still remains to be performed, it is impossible for money paid under that illegal contract to be recovered back. *Kearley* v. *Thomson et al*; 59 L. J., Q. B. 288.

CONTRACT — Specific performance. — Where a party offers by letter to sell another, a certain business, which offer the latter accepted by letter, and when the formal memorandum is submitted it contained a restraint upon the

defendant carrying on such business, which he declined to execute, the subsequent negotiations shew that no concluded agreement was made by the letters. *Bristol etc. Co.* v. *Maggs*; 59 L. J., Ch. 472.

COUNTY COURT— Jurisdiction.—A plaintiff cannot by giving a defendant a set-off against his, the defendants will, give jurisdiction to the County Court where the amount sued for, without allowing the set-off, exceeds the jurisdiction. *Hubbard* v. *Goodley*; 59 L. J., Q. B. 285.

COVENANT—Not to sell liquors.—A lessee of a theatre bought an adjoining piece of ground which was subject to a covenant not to carry on the trade of an innkeeper or retailler of wine, spirits or beer. He sold beer only to those who paid for ingress to the theatre. Held to be a breach of the covenant. *Buckle* v. *Fredericks*, 44 Ch. D. 244.

LIBEL—Malice.—The publication of part of a judicial proceeding if accurate and without malice, is privileged, even if the matter were libellous if said or done elsewhere than in such a proceeding. *McDougall* v. *Knight*, 25 Q.B. D. 1.

PARTNERSHIP — Arbitration. — A court will restrain a party from proceeding to arbitration, where injury will result to the party complaining, but it will not where the result of the arbitration will be futile and not injurious. *Farrar* v. *Cooper*; 44 Ch. D. 323.

PATENT—Infringement.—A patentee is entitled to recover by way of damages, subject to allowance for probable increase of sales through defendant's efforts, not only the sums found to represent the profits on sales made by the defendants, calculated at the original prices of the patentee, but also loss caused by reduction in price, which the defendant's competition compelled him to make. *Am. Braided Wire Co.* v. *Thomson*; 59 L. J. Ch. 425; 44 Ch. D. 274.

PRACTICE — Injunction. — The usual undertaking for damages on an application for an interim injunction, is not to be confined to damages sustained by the party against whom the injunction is granted. *Tucker* v. *N. B. Trading Co.*; 44 Ch. D. 249.

PRACTICE—Interest—A claim in the writ for interest upon the amount claimed from the date of the writ until judgment, is not a good demand for the purposes of III and IV Will. 4, cap. 42, sec. 28. *R. Ry. Co.* v. *R. Iron Co.* 25 Q. B. D. 146.

PRACTICE.—A judge in chambers has authority to fix a time within which affidavits must be filed on any application before him. *In re Davies*; 44 Ch. D. 260.

PRACTICE—Security for costs.—A married woman who has no separate property, except that which is without power of anticipation, and who appeals without a next friend, must give security for the costs of the appeal. *Whittaker* v. *Kershaw*; 44 Ch. D. 296. See *McMicken* v. *Ontario Bank*; 1 W. L. T. 96.

SALE—Delivery.—The old law was that no gift or grant of a chattel was effectual to pass it whether by parole or by deed, with or without consideration, unless accompanied by delivery. There are now two exceptions, one in the case of deeds, the other in contracts of sale where the intention is to pass the property before delivery. *Cochrane* v. *Moore*; 25 Q. B. D. 72.

SOLICITOR—Costs.—Taxation of part of an agency bill may be directed upon the terms of payment into court by the applicants of the whole amount claimed. *Storer* v. *Johnson*; 15 App. Ca. 203.

SOLICITOR—Misconduct.—Any one who choose to say that a solicitor had been guilty of misconduct can make an application and inform the court of the misconduct of its officers. *In re a Solicitor*; 25 Q. B. D. 26.

STATUTE OF LIMITATIONS.—Where a plaintiff in order to escape from the statute, brings charges of concealed fraud after a long lapse of time, the duty of making a full and candid statement is specially incumbent upon him. *Lawrance* v. *Nobbeys*; 15 App. Ca. 221.

REVIEWS.

A Manual of the Law of Registration of Titles to Real Estate in Manitoba and the Northwest Territories. By Louis William Coultee, Barrister-at-law. Toronto—Carswell & Co.

The author has had many obstacles to contend with consequent upon numerous changes recently made, in this Province specially, in the Land Titles Act. He has nevertheless furnished to the profession and public a thorough and valuable treatise under the modest title of a Manual. The volume is conveniently arranged in three parts. The first is an introductory analysis of the 'New System' of Title Registration, with numerous sub-titles. The second: The Manitoba Real Property Act of 1889, with notes and references. The third: The Territories Real Property Act as amended up to 31st December, 1889, with notes and references to the Manitoba Real Property Act. There is also an appendix containing the Manitoba Act of 1890, amending the Act of 1889, with references and notes. The work, we feel sure, will be of great assistance to the legal practitioner, and the author is entitled to much credit for the enterprise he has displayed, when the field for legal publications is so limited, as it is here in Central and Western Canada. The preface contains a useful list of bibliography relating to land transfer, and we cannot but sympathize with Mr. Coultée, when he laments the absence from our libraries of valuable works relating to this all-important subject.

CORRESPONDENCE.

AN APOLOGY DEMANDED.

The following letter has been received and we certainly think that the writer has just grounds for complaint. We tender him our most abject apologies. The mistake arose from the mailing clerk adding on Q. C. to the name of any gentleman whom he was not sure had evaded that honour.

.....July 26th, 1890.

To the Publishers Western Law Times Winnipeg:

DEAR SIR,—You have up to the present time been addressing my *Law Times* as follows: ——————, Q. C. As I am not one of Her Majesty's Counsel "Learned in the Law," I think I have a good cause of action for libel against you unless an immediate apology is made. I do not wish to have any litigation over the matter, but I will let you decide if it is not enough to *rile* any man to be addressed in such a manner after seeing a list of the new Q. C.'s.

Yours truly,

THE

WESTERN LAW TIMES.

VOL. I. SEPTEMBER 15, 1890. No. 6.

Legal Procedure in Manitoba.

The disorganized state of legal procedure in this Province demands our attention.

With slight modifications, the people of Manitoba have to rely on the law of England, as it existed, almost forty years ago. In other words, our civil procedure is mainly that of The Common Law Procedure Act 1852, and only so far as the same is applicable (*a*). Truly it is a sad sarcasm, to ask a lawyer in every case that comes before him to calmly review all the intricacies of such a general rule and apply it.

The whole effort of English jurists, in recent years, has been to bring wrongs within the purview of the courts, and to ascertain simple remedies. Simplicity, consistent with justice, is the essential of Civil Procedure.

We propose to briefly examine some of the curiosities of our present practice and endeavour to suggest a remedy therefor.

There are three forms of writs of summons. An ordinary writ, commonly called a ten day writ, with special indorsement for service in the jurisdiction, is served on the defendant, an affidavit of service is made, if the defendant does not appear by his attorney, judgment is signed, for

(*a*) The Court of Queen's Bench Act, 1885, sec. 7.

the amount endorsed, and execution issues at the end of eight days, from the last day for appearance. By not appearing the defendant is taken to have admitted the plaintiff's claim. We can suggest no form of procedure simpler than this. The strange anomaly however arises, that immediately after judgment a certificate can be issued and registered binding the defendant's lands but he is given eight days longer before his goods can be seized. The only reason apparently is, to give him eight days to abscond with all seizable goods. This curiosity should be abolished.

A writ for service out of the jurisdiction, on a British subject, for a cause of action which arose within it, cannot be specially endorsed. A statement of claim can be served with it, which is equivalent to a special endorsement. This being so, one would think that what was good enough for a British subject within the jurisdiction was good enough for one without it. However, according to a decision reported in this number at page 123 an order must be served with it allowing the plaintiff to serve the writ, then apparently an order must be obtained allowing the service, with leave to proceed under which, in order that the defendant may be better informed as to the plaintiff's cause of action, a declaration must *be filed in the Prothonotary's office.* It need not be served. This procedure is the height of nonsense. What necessity is there for an order allowing the plaintiff to serve the writ and then another one allowing the service? Why should a non-resident be better protected by the courts than a resident? If the former chooses to leave the country with his debts unpaid, the poor plaintiff should not be harassed by absurd procedure, and an absconding defendant be granted special privileges.

Then again consider how wise it is to require a declaration *to be filed.* Lawyers sometimes admit that they do

not understand the legal phraseology of a technically drawn declaration. What super-human wisdom then must the absent defendant be possessed of, so that he can read a legal statement filed in a court probably two thousand miles away! It is true the Legislature endeavoured to abolish this absurdity but the courts still construe the statute away (*b*).

It is unnecessary to notice the procedure under the Bills of Exchange Act which is simplicity itself.

Finally we come to the most absurd procedure arising out of a fiction that could be imagined; the procedure to obtain a judgment binding the assets within the jurisdiction of a non-resident foreigner. A writ is issued as before. It is not served but notice of the issue is. For some unknown reason, no special indorsement, or statement of claim, can be served but in the most roundabout way, imaginable, after a great deal of delay, judgment may be recovered. What is the use of issuing a writ if it cannot be served? Comments are unnecessary. All these writs and procedure thereunder should be homologated to that where issued for service within the jurisdiction. No reasonable excuse can be given for further delay on this matter. Twenty years have already gone by.

The pleading at present in use in this country has nothing to support its continuance save its antiquity. The object of pleading is to ascertain the points in legal controversy (*c*). It originated before the extraordinary powers of discovery by examination before trial, were granted to suitors. In effect the object was to grant against surprises, that the contentions of each party should be known to the

(*b*) If the Legislature will not abolish this absurdity entirely, we think that if they simply say that an *ex juris* writ may be specially endorsed, then in connection with secs. 25 and 26 C. L. P. A., 1852, and that no distinction is to be made in the procedure, as to a resident and non-resident defendant, much good might be done. 49 Vic., cap. 14, sec. 14.

(*c*) Stephen on Pleading VII Ed., preface.

other. How admirably this is not achieved by the system in vogue!

Everywhere, it has been swept away by legal reform (*d*). The most abstruse form of action is that relating to Real Property. Our Legislature has entirely abolished pleading there. Every court of Anglo-Saxon origin tries the most conflicting and diverse claims in an interpleader issue without pleading, in a most satisfactory manner. No complaint has been made as to the untechnical pleadings so used. English judges have even gone so far as to suggest that pleading might be abolished altogether even under the simplified forms of the Judicature Act. If such is possible what an admirable means of clogging the wheels of justice must our cob-web system of pleading be? Space forbids us to point out numerous other incongruities such as proceeding in one court by summons, and in the other by notice, requiring affidavits proving claim in a (*e*) mortgage action where the bill has been noted *pro confesso*, and the complicated methods of striking solicitors off the

(*d*) David Dudley Field in Reports of American Bar Association, Vol. XI., 1888, p. 69: "Do they know that the code of procedure of New York, which was framed and passed in 1848, which abolished the distinction between law and equity, has gone the circuit of the world? . . Do they know that the whole system of English equity procedure and law procedure is the procedure of the code of New York? . . It is true nevertheless. That code has been followed in twenty-six states and territories of this Union, and it is followed in almost every colony where there is an English speaking people. It is in Australia, it is in Singapore, it is in Hong Kong, it is in China."

(*e*) The following ruling was made in Mr. Leggo's time, upon an application by a solicitor, when an affidavit proving claim was demanded. This it will be observed is at a variance with the practice followed at present. "The practice of this Court in Equity is that in cases on mortgages, when a party is entitled to a præcipe decree, no affidavit of the mortgagee is required proving the mortgage debt."

March 28, 1883. "T. W. TAYLOR."

The original was frequently used in the Master's office and is now in our possession.

rolls. At present too, the rules of court common law and equity are in a state of barbarous confusion.

What then is the remedy? The very first suggestion given is the introduction of The Judicature Act. It appears to us that this act was intended to harmonize law and equity, assimilate the forms of procedure, and simplify pleading. The first it has nearly accomplished, the second also, but not as appears to us satisfactorily, the third has proved a partial failure. Yet it is admitted now that the act has proved on a whole satisfactory to every country wherein the Common Law Procedure Act was introduced and has been abolished (*f*). Ontario had it, and thanks to her Attorney-General, abolished it. British Columbia tried both systems and we believe prefers the Judicature Act. The Canadian North-West Territories have an excellent Code of Civil Procedure, worthy of the highest praise, which is a credit to the people who possess it and to the liberal minded judges who gave it to them.

Let it not be understood that we are enthusiastic over The Judicature Act. Such is not the case. It has its faults, yet whatever legal reform in Manitoba is made in civil procedure there is no other distinctive code from which we can draw. There is no option in the matter. It is extremely unwise for a new country to have a system of laws unlike any other country. The result is that the benefit of current judicial interpretation and legislation is utterly lost. Radical differences would be a curse to this country in the future, as it has been in the past. For the last ten years, except our own decisions and those of Ontario, we have had the wealth of current English decisions on civil procedure, completely closed to us since 1873. This has truly been a calamity. Our every day judicial life is impregnated with Meeson and Welsby and Dowling with the refinements of which Baron Parke is the author. In fact

(*f*) D. B. Reed, Q. C., Lives of the Judges, p. 393.

we belong to his school. The anathemas hurled upon it by the greatest jurist in England, quoted last month, are still fresh in the minds of our readers.

Lengthly argument is unnecessary to point out the necessity for a change. It must come, necessity itself will compel it. The uncertainty of judicial procedure is the strongest argument. Witness the case of the same judge giving three diverse and conflicting judgments on the same subject matter in five years. It is unpleasant for lawyers and how unjust to the poor clients. Shall this injustice continue? The country is indebted to our judges for some valuable and useful statutes. However, we think that the most fitting crown to the judicial reform so happily inaugurated by the present government, in giving us the finest real property system in the world, would be an *Act* or *Code of Civil Procedure*.

NOTES AND COMMENTS.

VACATION.

As vacation began on the first of August, and will end on the first of October, no excuse is necessary for the small number of cases reported in this issue. There are none others to report. THE WESTERN LAW TIMES has, so far, redeemed its promise to report promptly every decision of any importance rendered by the Courts of this Province.

A BRIEF CAREER.

Some few terms ago, a person who claimed to be an English Solicitor, and apparently was such, presented his certificates and applied to be admitted as an attorney of this Province. He had first to pass the necessary examination on the Statutes of Manitoba, and went up for that examination in due course. On this he utterly failed, his papers were really disgraceful, revealing the fact that he had no idea of the subject. The examiners presented their report showing he had not obtained anything approaching the necessary percentage, and that he had failed to pass. In the face of this fact which, from the very poor showing the candidate made, had become notorious, to the astonishment and disgust of many of the profession, he was unceremoniously and expeditiously "shoved through" by the influence of certain benchers and duly sworn in as an attorney of this Court. The reason given, by one at least of the benchers, was, that it was a matter of courtesy and he should be passed anyway. This poor argument need scarcely be noticed, for if this be a matter of courtesy simply, why go to the trouble and expense of holding an examination, and then override the examiners report by

accepting a person who had so signally proved his total incompetency? If it should be urged that the fact of this requirement appearing in our rules would prevent the profession from being crowded out by strangers, the answer is that surely we do not require to hang up a dragon's head in the shape of a dead letter statute, with which to scare off legal gentlemen from other countries.

The act requiring a foreign attorney to pass an examination on our local statutes is a fair and just one, and should be acted upon, and we question the legality of the above action of the benchers in admitting an attorney to practice who had failed to pass the examination directed by the statute.

Let us hope we will not again see repeated such a silly and undignified farce as the one above referred to, especially when in the present case all the unnecessary fuss and misdirected energy resulted in the following affair which cannot fail to cast discredit on the profession:

Deloraine *Times* Aug. 28, 1890:

"The effects of H. Windybank, a solicitor, who has removed him-"self to a more congenial place, leaving mourning creditors behind, "were sold out by the sheriff to-day (Thursday). There was lots of fun, "when 'Windy's' collars and cuffs were put up, his shirts, and even "his patent boots."

THE ATTORNEY-GENERAL vs. THE FREE PRESS.

The appearance of Mr. Luxton the editor of the *Free Press*, in the Police Court, on Wednesday morning the 10th instant, to answer an information of criminal libel against the Attorney-General of Manitoba, was an event which did not suprise either the Bar or the public, as this action of the leader of the Bar of Manitoba had been anticipated for some time, because of the repeated attacks made by the *Free Press* on his character. The failure of the prosecution, owing to inability to fasten the personal responsibility of the article complained of on the editor, occasioned general surprise, which however, was much in-

creased by the ample apology to Mr. Martin, published in the columns of the *Free Press* on the 11th instant. It remains to be seen whether the Attorney-General will accept this surrender, or proceed with a civil action and carry the war into Africa.

CONVEYANCERS AGAIN.

We beg to call the attention of the officers of the Law Society to this advertisement which appears at No. 496, Main Street, in this city,

> R. D. WAUGH,
> BROKER AND CONVEYANCER,
> ESTATE AND INSURANCE
> —AGENT—
> *Torrens Titles Secured.*
> Money to Loan. Room 4.

and the attention of the same gentlemen, and that of the executive council, to the following taken from the *Virden Advance*, Aug. 28, 1890 :

> JOHN HORSMAN,
> Oak Lake,
> ISSUER OF MARRIAGE LICENSES;
> LICENSED CONVEYANCER,
> COMMISSIONER IN B. R.,
> JUSTICE OF THE PEACE.
> Deeds, Mortgages, Agreements, Wills, etc., *legally* (?) prepared at moderate charges.

We regret to say that in spite of the representations which have been made to the government, and the wish of the Bar informally expressed to the Attorney-General during the last session of the legislature, and what has

appeared in these columns, appointments have been recently made to the office of licensed conveyancer (five this year) by the executive council. This matter ought to be one of the first to be taken up by the benchers when the Legislature meets again. The usefulness of the licensed conveyancer, if he ever had any, has gone. Duly certified gentlemen are now in practice at all points of the Province and are easy of access. There are many licensed conveyancers in Winnipeg where there is no necessity for them at all. Experience has shown they are dangerous here and bring discredit on the legal profession to which they seek to attach themselves. The greatest wrong is the effrontery with which they have invaded the Land Titles office and practice there to the detriment of the regular practitioner, a state of affairs never contemplated by the act under which they obtained their licenses, which act has been much abused by being made a medium for political patronage. They have no rights in the Land Titles office and the Law Society should see that its members are protected in city and country as far as possible. The refreshing way in which Mr. Horsman advertises himself as a J. P. has, we think, the doubtful merit of a new departure. Is the position of Justice of the Peace a business commodity? What can a Justice of the Peace have to buy or sell that he should advertise his office?

THE NORTH-WEST TERRITORIES REPORTS.

We have received the second number of these reports edited by W. C. Hamilton, Esq., Q. C., of Regina. We are forced to acknowledge that they are much better got up than our own Manitoba reports, presenting a very creditable appearance, though we think a less frequent use of italics would be desirable. They are moreover of the same awkward size as our Manitoba reports. This will be remedied very shortly so far as this Province is concerned, and the volumes made uniform in size with those of the

Eastern Provinces, which are convenient and handy. Mr. Hamilton has given us thirteen cases of considerable interest, all of which, except one, are holdings of the Full Court. Our regular monthly advance notes of North-West cases include all these decisions, with others not there given, since December last, saving the case of *Stobart* v. *Shorey*, of which, by permission of Mr Hamilton, we give a short note in this issue, making our reports of the holdings of the Full Court complete.

The editor has evidenced commendable enterprise in furnishing these reports to the profession of the North-West Territories, and the bar will, we doubt not, fully appreciate the real boon conferred upon it by the publishing and collection of the holdings of the Supreme Court in a country so new as our Canadian North-West.

STEPHENS vs. McARTHUR CORRECTED.

The above important case was first reported in the May issue of this journal and afterwards again reported in the July number. Subsequently the case appeared in an Ontario legal journal amongst the notes of cases, but unfortunately the holding of the court has been there wrongly stated, as it was not held that the Act respecting assignments was *ultra vires* of the legislature, but the very opposite. We draw attention to this correction as these matters of assignment and fraudulent preference have been receiving much attention in Ontario lately, and there is danger that some may be unwittingly misled by the above report, the mistake in which is doubtless owing to a printer's error.

RENOVATING THE COURT HOUSE.

We are glad to say that during the long vacation the Department of Public Works has not been idle, and that much needed repairs have been made to the Court House. The building has been repainted and thoroughly

cleaned. The colours used in painting have, in the main, been chosen with very good taste and blend harmoniously. We presume that a matting will be laid down in the court rooms and in chambers, where it is much needed. It is to be regretted that the county court offices were not moved down town as it would be a great convenience to the profession and the public, and also place a good deal of extra room at the disposal of the authorities, till we can get that great necessity, a centrally-located Court House.

CONSOLIDATION OF THE STATUTES.

It has just been publicly announced that the Honourable Mr. Justice Killam, Messrs. Ghent Davis and J. R. Haney, Barristers-at-law, have been appointed commissioners to consolidate the statutes of this Province.

COURT SITTINGS.

The following dates have been fixed for the various sittings of the courts:

ASSIZES.

Winnipeg—Tuesday, 28 October; Mr. Justice Dubuc.

Portage la Prairie—Tuesday, 4 November; Mr. Justice Killam.

Brandon—Tuesday, 11 November; The Chief Justice.

EQUITY.

Winnipeg—14 October; Mr. Justice Dubuc.

TERM.

Michaelmas Term begins 24 November and ends on 6 December following.

FLOTSAM AND JETSAM.

THE ROMANCE OF THE LAW.

If verification of the old saying that "Truth is stronger than Ficton" were needed, it can be found in the account of the extraordinary case of *Pickett* v. *Lyon* tried at Lewes before Mr. Baron Huddleston and a special jury, on 13, 14 and 15 August last. A very full report of the case, occupying nearly two pages, will be found in *The Times* (weekly edition) for 22nd August, to which we refer our readers.

The plaintiff was a "costumier" or lady's dressmaker, and he sued to recover a balance of nearly £900 on a total account for nearly £2,000, for dresses supplied to defendant's wife since their marriage in June, 1888, down to February, 1889, during which period of scarcely nine months, the bills came to over £1,900.

The defendant's wife, who had run away from home, came to London in 1877 at the age of sixteen, and had for many years lived an immoral life. She subsequently assumed the name of "Mrs. Spencer Stanhope," used the crest of that family on her cards and writing paper, lived in fashionable neighborhoods and pretended to be a widow, receiving money from unknown, but easily imagined sources. She became acquainted in August 1886, with Captain Warner, a gentleman of large property in Leicestershire, who allowed her, for two or three years, the very large sum of £4,000 annually. She lived with the Captain, when in town, in Belgrave-road as Mrs. Stanhope, he taking the name of Captain Stanhope.

Early in 1888, while in London, she casually made the acquaintance of Lieut. Lyon, of the Life Guards, then

twenty-six years of age, and married him secretly in June the same year, under the name of Fitz-Lyon. He had, after the payment of his regimental and customary expenses, some £500 per annum. She represented to him that she was a woman of ample private means. They took a house in Portland terrace and lived there till September. She desired her husband, for the sake of secrecy, not to call at the house in Belgrave-road, though she herself was in the constant habit of repairing thither to meet Captain Warner, who, however, had no idea till March, 1889, that "Mrs. Stanhope" was married, nor did the husband know of Captain Warner. When she then informed Captain Warner of her marriage, he completely parted from her, giving her £1,000 as a wedding present.

The deluded husband had no idea of this state of affairs, till it was accidentally disclosed to him during the course of an action that had been brought, in April 1890, by one Bonner a jeweller, for jewelry supplied to his wife. On receiving this dreadful intelligence from his counsel in the case, the unfortunate man was so shocked that he burst into tears and was removed from the court room. He refused to see his wife and instituted divorce proceedings which are still pending. In the present case the wife actually appeared as a witness on behalf of the costumier, against her deeply wronged husband, and went so far as to allege that her husband was not only aware all along of her intercourse with Warner, but really sanctioned her visits to him, and knew of her receiving money from him! This incredible statement was repelled by the husband and further negatived by expressions in letters of the witness herself. The learned judge in addressing the jury charged strongly against the plaintiff and made severe strictures upon the conduct of the wife, remarking: "I should have put an end to the case if it had not have been that a most frightful accusation has been introduced against Mr. Lyon,

which I thought, ought to be submitted to you. For the plaintiff's counsel was not content to put the case upon mere authority. He has charged that this gentleman connived or conspired with his wife to allow her to have intercourse with another man during their married life, and that, therefore, from that bare motive he endorsed or allowed the plaintiff to give her credit. That is a frightful issue."

The jury retired, about 3 o'clock, to consider their verdict, one of them observing (as was understood) that all but one were agreed for a verdict in the defendant's favour. This juryman still proving obdurate, they were discharged by the learned judge, on their coming into court at 10 minntes past 7, and judgment was by his direction entered in favour of the defendant husband, with costs. Explaining his action in taking this unusual step the judge remarked that at the close of the plaintiff's case the Solicitor-General had requested him to rule that there was no case to go to the jury. He intimated his opinion pretty strongly that there was not, but did not say then what ought to be done in that connection, and with a view of giving the jury an opportunity of indicating, still further, Mr. Lyons' character, he left the matter to them. When, however, they were discharged without a verdict, in furtherance of the repeated request of the Solicitor-General, he gave judgment for the defendant with costs as above stated. So ends a very sad case which, says *The Times*, is "one of the most extraordinary, perhaps, that ever came before a court of law," and concerning which the learned judge remarked "We have here the history of the modern Aspasia."

GOV. DALLAS' ADDRESS.

The following text of the opening address of Governor Alexander G. Dallas, the Governor-in-Chief of Ruperts' Land under the Hudson's Bay Company, extracted from

the Minute Book of the Council of Assiniboia, is not devoid of historical interest. The Governor had arrived at Red River on the eighteenth of May, 1862, about two weeks before the meeting of the Council :

"Minutes of a meeting of the Governor and Council of Assiniboia held on the 4th day of June, 1862, at which were present the following Members of Council, viz.:—

Alexander G. Dallas, Esquire, Govr.-in-Chief of Rupert's Land, President.

William Mactavish, Esquire, Governor of Assiniboia.

The Rt. Revd. The Lord Bishop of Rupert's L.	Councillor of Assiniboia.	
The Rt. Revd. The Lord Bishop of St. Boniface,	do	do
Henry Fisher, Esquire,	do	do
Francois Bruneau, Esquire,	do	do
John Inkster, Esquire,	do	do
Robert McBeath, Esquire,	do	do
Solomon Amlin, Esquire,	do	do
Thomas Sinclair, Esquire,	do	do
John Black, Esquire, Recorder and	do	do

The Governor-in-Chief of Rupert's Land rose from his seat and stated : That he appeared there to take his seat as Governor-in-Chief of Rupert's Land and that it would be his earnest endeavour to work with and assist the Council to the best of his ability, trusting very much to their support, and co-operation. Mr. D. also wished to correct an error which had inadvertently crept into the "Nor-Wester" newspaper, wherein it was stated that he was a large shareholder in the Hudson's Bay Company. It might strengthen his position to let it be known that he was not a shareholder, and had no direct interest in the Company. On receiving his appointment of Governor-in-Chief of Rupert's Land he was obliged to dispose of his stock, and resign his seat as a Director of the Company. He therefore stood before them independent of all interested motives, and anxious only to promote the best interests of the country."

THE CUSTOM OF DUNMOW.

The Revd. John Pickford has a very interesting note on this curious custom in *Notes and Queries* for 23 Aug. ult. The discussion in regard to this famed, and almost world-renowned custom, has lately been revived in consequence of an announcement in the columns of the *Daily News* to the effect that "there have been nine applications for the Dunmow flitch of bacon this year, and out of these the committee have selected two couples whom

they think likely to qualify . . ." In the course of his article the writer gives the following extract from the antiquary, Mr. Thomas Hearne, as to the proceedings in the court baron of Sir Thomas May, on the occasion of a bestowal of this time-honoured gamon of bacon.

Dunmow nuper Prioral. — At a court barron of the right worshippful Sir Thos. May, Knight, there holden on Friday, the 27th day of June, in the year of our Lord 1701, before Thomas Wheeler, gent., steward of the said manor, it is thus enrolled.

Homage. — Elizabeth Beaumont, spinster. Henrietta Beaumont, spinster. Annabella Beaumont, spinster. Jane Beaumont, spinster. Mary Wheeler, spinster. } Jur.

Be it remembered that at this court it is found and presented by the homage aforesaid, that Wm. Parsley and Jane his wife have been married for the space of three years last past, and it is likewise found and presented by the homage aforesaid that Wm. Parsley and Jane his wife, by means of their quiet and peaceable, tender and loving cohabitation for the space of three years aforesaid, are fit and qualified persons to be admitted by the court to receive the ancient and accustomed oath whereby to entitle themselves to have the bacon of Dunmow delivered unto them, according to the custom of the manor. Whereupon at this court, in full and open court, came the said Wm. Parsley and Jane his wife in their persons, and humbly prayed they might be admitted to take the oath; whereupon the steward with the jury, suitors, and other officers, proceeding with the usual solemnity to the ancient and accustomed place for the administration of the oath, and receiving the said bacon; that is to say, two great stones lying near the church door, where the said Wm. Parsley and Jane his wife kneeling down on the stones, the said steward did administer the oath in these words, or to the effect following :--

You do swear by custom of confession,
That you never made nuptial transgression;
Nor since you were married man and wife,
By household brawls or contentious strife
Or otherwise at bed or board
Offended each other in deed or in word;
Or in a twelvemonth's time and a day
Repented not in thought any way;
Or since the church clerk said Amen,
Wished yourselves unmarried again,
But continue true and in desire
As when you joined hands in holy quire.

And immediately thereupon Wm. Parsley and Jane his wife claiming the said bacon, the court pronounced sentence for the same in these words, or to the effect following :—

Since to these conditions without any fear
Of your own accord you do freely swear,
A whole gammon of bacon you do receive,
And bear it away with love and good leave ;
For this is the custom of Dunmow well known,
Tho' the pleasure be ours, the bacon's your own.

And accordingly a gammon of bacon was delivered unto the said Wm. Parsley and Jane his wife, with the usual solemnity.—Examd pr *Tho. Wheeler*, gent., steward,—*Willm Hague.*"

CHARGING A JURY IN BED.

We take the following account of a very humorous occurrence from the *Law Journal* of Aug. 9, last :

" At the Sussex Assizes at Lewes, South-Eastern Circuit, on August 6, the business opened before Mr. Baron Huddleston under circumstances probably without precedent. Certainly the oldest officers of the assizes, and those who have gone circuit for fifty years, knew of no similar instance. In consequence of a sudden and severe attack of gout in the course of the night the learned Baron was utterly unable to leave his bed, and the medical gentlemen called in declared that the attempt to do so would be dangerous. The learned Baron at once telegraphed to London for assistance, but as no one could arrive within two or three hours, he thought it would not be well to keep the grand jury waiting all that time, so he considered whether he could not charge the grand jury in his bed. Happily, though the case had never before occurred, the terms of the commission of assize were wide enough to allow of it, for it was worded thus—'at such places and times as you may appoint,' and so the Baron 'appointed' his bedroom, and charged the grand jury in bed. The deputy-clerk of assize (Mr. H. Reed) announced in Court at the usual hour (eleven in the forenoon) that, by reason of the judge's illness, the assizes were adjourned to the judge's lodgings, and accordingly the high sheriff, attended by the under-sheriffs and the chaplain and the clerk of assize, and followed by twenty-three gentlemen of the county as grand jurors, walked to the judge's lodgings, and were ushered upstairs to the judge's bedroom. The high sheriff, with the two under-sheriffs, stood at the head of the bed on one side, the clerk of assize on the other, and the gentlemen of the grand jury were ranged round the foot and sides of the bed. The usual formalities were then gone through, the commission was read, the names of the grand jurors were read over and they answered, and they were sworn in due form, and then the learned Baron proceeded to charge them from his bed with his usual skill, clearness, and facility. It should be mentioned that at the judge's express desire the doors were left open and representatives of the press were present. His lordship said he desired it to be known that this was a public Court, and that any of the public might come in who could—at which the grand jury laughed, the room being pretty full.

The grand jury were attended back to the Court house by the high sheriff and the officers of justice, and they at once applied themselves to the business before them.

At half-past 2 o'clock Mr. Philbrick, Q. C., arrived, and proceeded to try prisoners."

Epitome of English Decisions.

ASSAULT—Criminal offence.—Evidence.—The unsworn evidence of a girl under thirteen, received under sec. 4 of the Crim. Law Amend. Act, 1885, against the prisoner indicted for an indecent assault upon her, is inadmissible, the statute not extending to the offences of rape or indecent assault, and the conviction must be quashed. *Queen* v. *Paul*, 25 L. R. Q. B. D., 202.

ATTORNEY—Striking off rolls.—An order made by a Divisional Court striking a solicitor off the rolls, under sec. 32 of Attorneys and Solicitors Act, 1843, for permitting his name to be used in an action for the profit of an unqualified person, is not an order made in a "criminal cause or matter" within the meaning of sec. 47 of the Judicative Act, 1873, and the Court of Appeal has jurisdiction to entertain an appeal from such order. In *re Eede*, 25 L. R. Q. B. D., 228.

BILL OF SALE—Description of chattels.—Where the articles described in a bill of sale were set out as follows: "Roan horse, 'Drummer'; brown mare and foal; three rode (sic.) carts," and there was no evidence to show that the goods could not be identified from the description, or that the goods described were incapable of identification, the description was held to be sufficient. *Hickley* v. *Greenwood*, 25 L. R. Q. B. D., 277.

PERSONAL INJURY—Damages.—That where a person exhibits an elephant, which is an animal of a wild and untamed class, and a class that is dangerous though individuals may be tamed, he takes the risk of any damage such an animal may do, and the defendant was liable for the injuries inflicted by the elephant on the plaintiff, though he did no know such animal to be dangerous. *Filburn* v. *The Peoples Palace Co.*, 25 L. R. Q. B. D., 258.

PRACTICE—Interrogatories.—Where an action had been brought under II Geo. 2, cap. 19, sec. 3, to recover double the value of goods alleged to have been fraudulently removed by tenant, the court refused an applicatian to administer interrogatories on the ground that the action was penal. *Hobbs* v. *Hudson, et al.*; 26 L. R. Q. B. D., 232.

————Security for costs.—Where a company in liquidation commenced an action against a shareholder for calls, and there was no evidence to rebut the inference that the assets of the company would not be sufficient to pay the defendant's costs if he succeeded, an order was made directing the plaintiff to give security for costs under the Companies Act, 1862. *Pure Spirit Co.* v. *Fowler*, 25 L. R. Q. B. D., 235.

————Writ of summons.—A writ of summons had been issued on April 6, 1861, and regularly renewed under C. L. P. A. down to March 5, 1890, and served shortly after the latter date. On a motion to set aside the service on the ground that the writ was no longer in force, it was held that the writ should have been renewed by leave of a Court or Judge under Order VIII., r. 1, of the Judicature Act, 1875, and the service thereof was set aside with costs. *Hume* v. *Somerton*, 25 L. R. Q. B. D., 239.

PROHIBITION.—A defendant appeared to an action and the case was partly heard and adjourned to a future day. On the second hearing the defendant, for the first time, objected to the jurisdiction of the Court. The court having determined that the defendant had waived the objection by appearing to and contesting the action, the defendant applied for a prohibition which was refused, the defendant by his actions, having waived the objection to the jurisdiction. *Moore* v. *Gamgee*, 25 L. R. Q. B. D., 244.

WILL—Probate.—Where a will is made of South African property and another is made disposing of English property, one can be proved apart from the other upon the production of an attested copy of the one for which probate is not asked. *In the goods of Callaway*, 15 Prob., Div. 147.

THE

WESTERN LAW TIMES.

VOL. I. OCTOBER 15, 1890. No. 7.

The Canadian Commonwealth, as it was and is.

Twenty years, yes, almost twenty-five, have passed away since Canadian Confederation became a fact. That time may be brief, yet it is not too brief to investigate how the ideas as to the future legal development of the untried constitution, without a precedent in modern history, have harmonized with the real growth.

Remarkable too, was the effort to model a written constitution on an unwritten one. To possess the flexibility of the latter with the stability of the former, seems almost a paradox, yet such was the effort of Canadians, when they modelled their future local government upon that of the mother land.

In view of the deep interest taken in the constitution, which has just past the experimental age, by English publicists, such as Bryce and Dilke, it may not be amiss in a journal of this nature if we attempt to briefly trace its legal development.

When the Canadian Senate became a part of the proposed constitution as set out in the Quebec Resolutions (*a*) it was with "a desire to follow the model of the British constitution so far as our circumstances will permit." (*b*).

In pursuance of this desire, the Senators hold office for life. It was thought that "this would render the Upper

(*a*) Sec. 11. (*b*) Sec. 3.

House a thoroughly independent body." (*c*) "That by appointing them for life, and limiting their number an absolute authority will be created which will be quite beyond the control of the people and even of the Executive." (*d*) The average Canadian now, we fear has no such presentment. As well almost might the Senate of Canada never have been formed, as that it should exist as it does at present, sunk in "innocuous desuetude." There has been no conflict in recent years between it and the Commons.

Occasionally some Senator disturbs its dream like existence by some important resolution which the Commons has not time to investigate, and good results to the country. We venture to say, however, that the only excuse for its existence, during the last ten years, has been an investigation, that of the resources of our Great Mackenzie Basin.

The Senators represent no class, sect, creed, estate or social organization. No Legislation originates there save what is thrust upon it by the Government occasionally, perhaps as an excuse for its existence as a "political infirmary." Its model, the House of Lords, represents an estate and a different interest from that of the Commons. Canadian Legislators forgot that it was impossible to create a house which would be an active governing body in Canada such as the House of Lords. The element of length of service, it was thought, would result in the same independence that characterises the judiciary. The fact that the judiciary is without a great popular rival was overlooked in its creation. As a vigorous instrument of government we may therefore regard the Canadian Senate as a failure.

The Commons, including also the Local Legislatures have developed coeval with the democratic evolution in Great Britain. Briefly then the Commons is mainly the

(*c*) Confederation Debates. George Brown, p. 89.

(*d*) Confederation Debates. Hon. (afterwards Sir) A. A. Dorion, p. 570.

sole active governing body in Canada. Its supremacy in matters Local or Federal as far as its exclusive jurisdiction appertains is supreme. The Governor-General must follow the advice of his constitutional ministers. The Lieutenant-Governor is even more strictly bound. This has resulted in the entire transference of power to the Prime Minister for the time being. Finally the Prime Minister becomes virtual ruler of the country and the Governors the nominal. It is to be conceived as passing strange, that in Canada the power of the Democracy to elect their rulers for long periods is greater than that of those self confessed republics such as the United States. A President can only reign for four years, although his party may govern without interruption for a lifetime. On the other hand a Canadian statesman who has both the executive and legislative functions under his control, reigns for the lifetime of the supremacy of his party. The oft repeated instance that, with one exception, the present premier has been almost in reality the ruler of the Canadian Dominion for its entire existence, is only equalled by that of his colleague Oliver Mowat in Ontario. This only leads to one conclusion: that the uninterrupted continuance of supreme power is more capable of attainment in a colonial semi-monarchal power than in a republic itself. In other words: the prime minister of a Canadian Government is more supreme than a president of a republic. A strange result in a strange place.

The Supreme Court of Canada was not established coeval with confederation but power was given for its future position (*e*). It is not only a Federal Court of original jurisdiction, but is a Court of Appeal from all the Provincial Courts. It is well known that in the United States there are two separate judiciaries, that of the Federal Government and those of the respective States. Many Canadians entertain a very erroneous opinion in reference

(*e*) B. N. A. Act, sec. 101.

to the Supreme Court of the United States. They suppose that all appeals from State Courts can be finally heard in the Supreme Court. Such is not the case. The State Courts' decisions are final when the action arises *inter alia* between citizens of the same State, and is heard in the State Courts. When corporations which usually partake of an international character, enter into litigation, such usually takes place in the United States Courts. Contests between citizens of different States also have their remedies in the latter. In Canada then the Supreme Court is both a court supreme to the State or Provincial Courts, and a Federal Court in the strict sense of the term. It is regarded as a Federal Court by the Dominion Parliament. When Mr. Justice Fournier, then Minister of Justice, introduced the bill for the establishment of the Supreme Court and a discussion arose upon the clause making the Supreme Courts decision final and conclusive saving the Queen's prerogative, he said: "Every one admitted that it was very important that the Federal Government should have an institution of its own, in order to secure the due execution of its laws. There might perhaps come a time when it would not be very safe for the Federal Government to be at the mercy of the tribunals of the Provinces. He believed this to be an anomaly contrary to the spirit of our constitution" (*f*). He also said in reference to the appeal by way of petition to the Queen and the consequent hearing before the judicial committee of the Privy Council, "that while he did not desire to put any unnecessary obstacle in the way of exercising the right of petition, he wished to see the practice put an end to altogether" (*g*). The House of Commons afterwards virtually assented to this principle *in toto* by a vote of 112 for, to only 40 against, in a non-party vote (*h*). This was a remarkable thing for a colonial gov-

(*f*) Hansard Debates, Canada, 1875, p. 288.

(*g*) P. 286. (*h*) P. 980.

ernment only eight years old. It is well known that the judicial committee of the Privy Council must be composed of persons at the date of their appointment who are or "have been judges of one of Her Majesty's Superior Courts at Westminister or a Chief Justice of the High Court of Judicature at Fort William in Bengal or Madras or Bombay, or of the late Supreme Court of Judicature at Fort William in Bengal" (*i*). This Act, it will be observed, was passed in 1871. No provision has been made for the appointment of any judges from any of the self-governing colonies, such as Australia and Canada. This we believe to be a grave oversight. Canadians are democratic enough to question the ability and fitness of their judges, and they do think that in the construction of statutes relating to constitutional rights, judges more thoroughly imbued with the spirit of colonial independence would command more respect than those not so chosen. In other words, India is not a good training school for constitutional judges.

We venture to say that in the western part of Canada, the decisions of our own Supreme Court have as much weight and are as much respected as those of the Judicial Committee of the Privy Council. In recent years the tendency of the Committee seems to be to limit the exercise of the right by petition. This can only be in accordance with the growing spirit of Canadians to be left alone to manage their own affairs.

There is another development in connection with the Supreme Court. Provincial Courts, although the judges are paid by the Dominion, are tending to become provincial in their feelings. This cannot be avoided. The judges are drawn from the provincial bar. No more ardent defenders of provincial rights can be found than they, and it is useless to expect that their sympathies are not with their immediate fellow citizens. Apparently, partly in

(*i*) 34 and 35 Vic., c. 91, (Imperial).

consequence of this, the Dominion insists upon all constitutional questions being referred to the Supreme Court, provided the Local Legislature will consent. With as much earnestness the Local Legislature refers all constitutional questions to the Local Courts. The Dominion too, seems to be jealous of intrusting petitions of right in which it is interested to Local Courts, and has established a perambulating Court on the model of the United States Circuit Courts for the hearing of such matters. Instead then of a united system of Judiciary as the fathers of confederation dreamed would exist, there seems to be a development towards the United States system. How far this development may extend remains to be seen. It is questionable whether the Dominion could not establish entirely the United States system under the provision that they may provide for the "organization of a General Court of Appeal for Canada *and for the establishment of any additional courts for the better administration of the Laws of Canada*" (*j*).

Space forbids our dwelling on the fact that under the term "Provincial Rights" the same doctrine of *State sovereignty* which proved so troublesome for ninety years of the existence of the Republic to the south, has arisen in Canada. It is a logical conclusion that with the same people and somewhat similar circumstances, the same questions and lines of development will take place. We may cavil at the fact as we will, but "Provincial Rights" or "State Sovereignty" may prove just as troublesome in the one country as the other.

The war of the rebellion was necessary to end it and make a united people. Can a prophet foretell in what happy way we may avoid this alternative? If so he will gain the good-will of all who believe in the ultimate development of a Canadian nation.

(*j*) Sec. 101, B. N. A. Act.

NOTES AND COMMENTS.

THE REAL PROPERTY ACT.

The Government of this Province has unreservedly committed itself to the entire abolition of the old registration system. This policy has met with the distinct approval of the people, and the government has brought about two-thirds of the thickly settled portions of the Province under the new Land Titles Act. The other third should be brought under the operation of the Act without delay, and the remaining registry offices wiped out, thus ensuring uniformity of title throughout Manitoba. We refer particularly to the old offices at Stonewall and Selkirk, which ought to be added to the Winnipeg district, as should also the office at Emerson. It is, moreover, decidedly unfair to those registrars whose offices were long since abolished, that any exception should be made to the general rule. We are glad to see that no such exception has been made in the Attorney-General's own district. We fully appreciate the difficulties that the Government has, and will have, to overcome. The jobbing tactics and petty interests of local politicians which array themselves against this policy, must nevertheless not be allowed to burke the operation of a system most advantageous to the community at large.

REVISION, NOT CONSOLIDATION.

We have heard with deep regret that the ensuing decennial consolidation of the Manitoba Statutes will not be a revision, but simply a consolidation. There is no reason why it should not be both. The tendency in modern Legislatures is to both revise and consolidate. We would like to see "The Married Woman's Property Act" of

England substituted for that of Ontario. The former has at least greater merit in the way it has been drafted, the judicial decisions upon it are more numerous, and in our humble opinion the object of the Act is better attained. Then too, "The Infants Relief Act, 1874" England, might well be introduced here in many of its provisions, and our own law harmonized to meet these introductions. There are many other enactments of a like nature. To consolidate the statutes does not require much legal strength. To revise would be complimentary to the Commission. We would like to see a revision similar to the last Dominion Statutes and those of Ontario, otherwise much money will be wasted the next session repealing poor legislation. Space forbids exhaustive comment.

THE MANITOBA REPORTS.

The forthcoming number of the Manitoba Reports will be the first issue under the new management. While the old series is doubtless a useful publication, still it is nevertheless unsatisfactory in many ways. The irregularity of issue, the chronological disorder of the cases, the absence in some instances of even any date, the awkward size of the volume and the poor type and paper have been defects in the past which we hope to see remedied at the earliest possible date. A graver matter is the misleading and inaccurate headnotes which too often occured, and a very insufficient and slovenly index. We do not wish to be unduly captious, but a new publisher would cure the defects in printing, and the arrangement with the present printer should be brought to an end as soon as it can be done. We hope to see the reports a credit to the profession in the very near future and feel confident that they will be. The last issue, No. 10, should conclude volume six and a fresh volume be commenced with the advent of the new reporter to office. It is only fair to him that he should start with a clean sheet.

REGINA v. BOYLE.

Though we were of the opinion that the charges made against Mr. Boyle were totally unfounded, having been present at the trial of the suit of *Evans* v. *Balfour* out of which the accusation arose, yet we were not prepared for such a total collapse of the prosecution as that which took place, on the first instant, before the Chief Justice. It is to be regretted that the criminal law is susceptible of being made the weapon by which the malevolent and the vindictive can harass and annoy the public for the purpose of private vengeance, or thinly veiled extortion. We hope that the strong expressions of censure and disapproval used by the learned judge as to the conduct of the private prosecutor, will have the effect of making those who think of rashly putting the criminal law in motion, carefully consider the consequences to themselves before so doing.

Mr. Boyle has the sympathy of the community, who cannot but admire the fearless way in which he faced and confounded his accusers.

SECULAR PRESIDENTS.

The recent appointment of Henry Wade Rogers, Dean of the Faculty of Law, in the University of Michigan, to the Presidency of the North Western University in Illinois, marks an era in the secular development of the American University system. Similar to Seth Low, the new President of Columbia College New York, Mr. Rogers is a lawyer, distinguished for his attainments in that profession. He was formerly one of the editors of *The American Law Register.*

Both institutions are upon religious foundations but that does not prevent an able and intelligent man being called to the Presidency. In Canada, on the other hand, such an appointment would be impossible. The President must always be a clergyman, a sound scholar, doubtless, but a clergyman first of all. We do not admit the "divine

right" of clergymen to entire pre-eminence in the domain of scholarship. The tendency, moreover, of the Canadian people is to secularize their University system as in the United States. We cannot but think that such a result will be beneficial.

LEGAL PROCEDURE IN MANITOBA.

Our attention has been called to the fact that some of our readers might suppose that the leading article, published last month under the above caption, was intended to be a complete code of the practice under a particular heading. For the benefit of those we may say, that we would feel flattered if the complex practice relating to the issue of writs and service thereof could be condensed by us into twenty ordinary pages of this magazine, let alone one. However, the reference on page 116, line 17, must be taken to refer to the practice under 49 Vic., cap. 35, sec. 32, sub.-sec. *e*. This is the case referred to in the notes of cases at p. 124. The order for leave to proceed referred to in the case, *The Empire Brewing Co.* v. *Harley*, was the usual one, containing an order allowing service of the writ as well as of the leave to proceed. This appears from the judgment. We are also informed, that the Referee requires declarations in such a case to be *both filed and mailed to the defendant*. Such is an effort to graft a sensible procedure on a nonsensical basis. Nevertheless, we hope that at the ensuing Legislature, the present inconsistent practice relating to the issue, service and proceedings on writs of summons will be abolished.

FLOTSAM AND JETSAM.

PRECEDENCE AT THE BAR.

The first legal society of this Province was formed in the autumn of 1871, under the provisions of 34 Vic., cap. 10, s. 4, which provided: "Whenever ten persons shall have been admitted Members of the Bar of this Province, they may meet and constitute themselves a Bar Society, and the Society so formed may make such rules as they deem fit, regulating admission to the study and practice of the Law, etc." Under this Act the Bar Association of Manitoba was formed as above stated. The Attorney-General, the Hon. H. J. Clarke, Q. C., lately deceased, was chosen president, Mr. W. B. Thibaudeau, secretary, and Mr. D. M. Walker, treasurer. The English examiners were Messrs. John F. Bain and W. B. Thibaudeau, and the French examiners were Messrs. Joseph Dubuc and the Hon. Joseph Royal. This Bar Association was superseded in 1877 by "The Law Society Act" of 40 Vic., cap. 14, providing that "all persons having been duly admitted to the bar, and being at the time of the passing of this Act in actual practice of the legal profession in this Province, and all others who may become members . . . under this Act, shall be and are hereby incorporated by the name and style of 'The Law Society of Manitoba,' etc." The 3rd section provided that the first nine benchers should be: The Hon. Joseph Royal, the Hon. Joseph Dubuc, John Farquhar Bain, David Marr Walker, Francis Evans Cornish, Sedley Blanchard, Samuel C. Biggs, Joseph Ryan and Allan McDonald, and the 5th sec. declared the Hon. Joseph Royal to be the first president. Thus was founded the existing society.

The 27th section of the Act provided that there should be two parchment rolls for barristers and attorneys respectively, and that the prothonotary should keep one set of rolls in his office and that the secretary of the Law Society should keep the other. This was done, but owing to the hurry and confusion of early days not one of the rolls shows a complete list of the barristers or attorneys of this Court. The reason of this was that some of the old barristers and attorneys had died or left the Province before the new Law Society was formed and the rolls of the old Bar Association were most unfortunately burned when the old Parliament buildings were destroyed by fire on 3 December, 1873. The rolls in possession of Mr. Walker, the prothonotary, are far more complete than those of the secretary of the Law Society, which latter were much neglected, and have very many blank spaces and important omissions. For these reasons the latter are very unreliable for the earlier years. Lately, however, they have been carefully kept and are quite trustworthy. In the prothonotary's roll of barristers, the first page is in total chronological disorder, many names appearing at the beginning of roll, and improperly in advance of their seniors by many years at the Bar. One striking instance is in the case of the late Mr. Clarke, Q.C., who appears 25th on the roll, whereas he should be the first, as appears by an order-in-council settling and assigning seniority, which will be later noticed. These usurping gentlemen ought not to have been allowed to sign their names out of their order. Spaces should have been reserved by the officials then in charge of the rolls for the older members of the bar who were absent or dead. Of course the matter seemed of no moment then, but now that our Society is well in its teens the proper ranking of its members should be maintained as a matter of legal history at least.

We give below in list A the order of priority and seniority assigned to the bar by order-in-council dated Dec. 30,

1872. It is very fortunate that we are thus enabled, in great part, to supply the deficiencies of the lost Bar Books and from such an indisputable source.

List B contains an exact copy of the first and second pages of the prothonotary's barrister's roll, 67 signatures. We will give the names on the remaining pages at a future time. The names in brackets are omitted in the secretary's roll; no less than 19 in the first two pages. Those marked with an asterisk are transposed in that roll.

LIST A.

H. J. H. Clarke,	Jan. 10,	1871.
M. A. Girard,	May 8,	1871.
James Ross,	" "	"
Joseph Royal,	June 29,	"
Joseph Dubuc,	" "	"
John F. Bain,	"	"
†Daniel M. Walker,	"	"
H. J. McConville,	"	"
Felix Chenier,	"	"
F. I. Clarke,	Sept. 15,	"
Rice M. Howard,	Oct. 20,	"
W. M. Herchmer,	" "	"
W. B. Thibaudeau,	" "	"
Sedley Blanchard,	April 16,	1872.
Hayter B. Reed,	" "	"
Wm. Hill Nash,	July 10,	"
Frank E. Cornish,	" 17,	"
H. P. Parke,	" "	
Henri St. Louis,	" "	"
David C. Gagnier,	September 27,	"
Joseph Ryan,	" "	"
Hon. Alex. Morris,	October 1st,	"
Daniel Carey,	" 5,	"
John Macdonell,	" "	"
W. B. Canavan,	November 6,	"
Hon. Jas. Chs. McKeaghney,	" "	"
Hon. Louis Betourney,	Dec. 12,	"
Frederick McKenzie,	" "	"

† (Sic, not David, as it should be).

LIST B.

J. Royal, Winnipeg.
Joseph Dubuc, Winnipeg.

F. Evans Cornish,	Winnipeg,	Selkirk.
D. M. Walker,	"	"
Jno. F. Bain,	"	"
Sedley Blanchard,	"	"
F. McKenzie,	"	"
Daniel Carey,	"	"
Frank I. Clarke,	"	"
W. B. Thibaudeau,	"	"
Samuel C. Biggs,	"	"
J. M. Macdonell,	"	"
Allan Macdonald,	"	"
Stewart Macdonald,	"	"
John O'Reilly,	"	"
E. Lake Osler,	"	"
P. A. Kierzkowski,	"	"
W. Hill Nash,	"	"
W. H. Ross,	"	"
Hayter Reed,	"	"
H. R. O'Reilly,	"	"
R. T. Huggard,	"	"
*Wm. J. James,	Portage la Prairie, Marquette West.	
*Rice M. Howard,	City of Winnipeg.	
Henry J. Clarke,	Winnipeg.	
Heber Archibald,	City of Winnipeg.	
A. W. Ross,	"	
[J. N. Provencher],	Winnipeg.	
A. C. Killam,	do	February 1879.
J. A. M. Aikins,	"	" "
[W. Birch Canavan],	do	" "

(Page 2.)

A. Monkman,	Winnipeg,	June 5th, 1879.
H. M. Howell,	Winnipeg,	June 5th, 1879.
[P. Vances Georgen],	Selkirk,	June 5th, 1879.
[E. M. Wood],	Winnipeg,	Trinity Term, 6th Sept., '79.
F. E. Burnham,	Emerson,	Trinity Term, 6th Sept., 1879.
W. H. Culver,	Winnipeg,	Hilary Term, 2nd February, 1880
[A. J. McColl],	Winnipeg,	Hilary Term, 13th February, '80.
P. A. Macdonald,	Winnipeg,	Easter Term, 19th June, 1880.
Geoff H. Walker,	Winnipeg,	Easter Term, 19th June, 1880.
Alex. Haggart,	Winnipeg,	Easter Term, 19th June, 1880.
[James W. Holmes],	Emerson,	Trinity Term, 3 Sept., 1880.
[A. M. Sutherland],	Winnipeg,	Trinity Term, 6 Sept., 1880.
[C. S. Rankin],	Winnipeg,	Trinity Term, 6 Sept., 1880.
Thomas S. Kennedy,	"	" " " "
Eugene D. Carey,	"	Michaelmas Term, 13th Nov., '80

[W. R. Black],	Portage la Prairie,	Hilary Term, 15th Feby., 1881.
[C. E. Hamilton],	Winnipeg,	Hilary Term, 15th Feby., 1881.
G. A. F. Andrews,	Winnipeg,	Hilary Term, 15th Feby., 1881.
[Walter A. Wilkes],	Winnipeg,	Easter Term, 9th June, 1881.
[John Morrow],	Winnipeg,	Easter Term, 9th June, 1881.
L. A. Prud'homme,	Winnipeg,	Easter Term, 18 June, 1881.
[Michael Kew],	Winnipeg,	Easter Term, 3d September, 1881
[D. B. Woodworth],	Winnipeg,	Trinity Term, 6th Sept., 1881.
A. Dawson,	Winnipeg,	Michaelmas Term, 10th Nov.,'81
F. Beverley Robertson,	Winnipeg,	Michaelmas Term, 10th Nov.,'81
[John Crerar],	Minnedosa,	Michaelmas Term, 15th Nov.,'81
[J. D. Morice],	Winnipeg,	Hilary Term, 1 Feby., 1882.
Robert Cassidy,	do	" " 9 " "
John S. Ewart,	do	" " " " "
[Gideon Delahaye]	do	" " " " "
J. H. D. Munson,	do	" " 9 " "
N. F. Hagel,	do	" " 9 " "
H. E. Henderson	do	" " 9 " "
[F. G. A. Henderson],	do	" " " " "
[W. F. Ellis],	do	" " " " "
Gerald F. Brophy,	do	" " " " "

(2nd page ends here.)

Epitome of English Decisions.

BILL OF SALE — Possession — Pledge of chattels.— A sheriff having seized certain chattels, the owner agreed with defendant that defendant should satisfy the sheriff, and that the sheriff's officer should hold goods for defendant as pledged to him, which agreement was reduced to writing. The owner, on account of illness, continued to reside in the house with sheriff's officer, for two weeks, but executed a bill of sale to the plaintiff who was ignorant of the above facts. It was determined that though the defendant would have prevailed at common law, yet his title was rendered invalid of the Bills of Sale Act, the written agreement above mentioned not coming within the operation of that Act. *Mills* v. *Charlesworth*, 25 Q. B. D. 421.

CONTINGENT INTEREST—*Spes successionis*—Inheritance.—It is indisputable law that no one can have any estate or interest at law or in equity, contingent or other, in the property of a living person. During the life of such person no one can have more than a *spes successionis*, an expectation or hope of succeeding to his property and it is the same where there is a limitation by will or settlement of real or personal property to the heir or statutory next of kin of a living person. *In re Parsons, Stockley* v. *Parsons*, 45 Ch. D., 55.

EASEMENT—Right to air—Prescription—"Lost grant."—If a legal right is proved to have existed and been exercised for a number of years, the law ought to presume a legal origin which constitutes a "lost grant." When for over forty years a brewing cellar, excavated in the rock, had been ventilated through an air shaft opening into a grated well in an adjoining yard, the court presumed a lost grant, and granted an injunction restraining the closing of the well. *Bass* v. *Gregory*, 25 Q. B. D. 481.

MARRIED WOMAN—Debt contracted before marriage.—Where judgment was obtained against a married woman, who subsequently obtained a decree for dissolution of the marriage and married again, and by settlement made by her on second marriage, her property was settled to separate use without power of anticipation, such judgment was held to be a "debt contracted before marriage" within the meaning of sec. 13, of Married Woman's Property Act, 1882, and the restraint was invalid. *Jay* v. *Robinson*, 25 Q. B. D. 467.

PRACTICE—Appeal from decision on case stated—"Judgment" and "Order"—"Final judgment."—A decision of a Divisional Court on a case stated under s. 19 of the Stamp Act, 1870, is an "order" and not a "judgment." A "judgment" is a decision obtained in an action, and every other decision is an "order." A "final judgment" is a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established. *Onslow* v. *Commissioners of Inland Revenue*, 25 Q. B. D. 465.

PRACTICE— Appeal from order of official referee.—An appeal will lie to set aside the findings and judgment of an official referee to whom an action had been compulsorily referred, and who had ordered judgment to be entered for the defendant. The decision of an official referee is subject to the same rules as to appeal as the decision of a judge without a jury. *Clark* v. *Sonnenschein*, 25 Q. B. D. 464.

PRINCIPAL AND AGENT—Following fraudulent proceeds—Corrupt bargain.—It is not true as a general proposition, that in every case in which an action for money had and received will lie, the money can be followed in the hands of the defendant. Where a foreman secretly received a commission from a manufacturer on goods supplied to his employer and the employer, brought suit to recover such commission from their foreman, and sought an injunction to restrain the defendant from dealing with the investments of such corrupt moneys, it was held that the relation was that of debtor and creditor and not that of trustee and *cestuique trust* and the application was refused. *Lister* v. *Stubbs*, 45 Ch. D. 1.

RESULTING TRUST—Partnership—Assignment.—An insolvent firm assigned the business and assets to trustees upon trust, to either carry on the business, or realize the assets as they thought advisable, and in either case, out of the moneys received to "pay and divide the clear residue of the said profits and moneys, unto and among, all and singular, the creditors of the said firm in rateable proportions according to the amount of their several and respective debts, subject nevertheless to the covenants and provisions hereinafter contained. The trustees were empowered to "pay in full or make such arrangements with any creditors whose debts are under £30, or any of them, as they may think fit." The assignors, some years later, having sued the trustees for account, and having sought to have a sale of a large part of the assets impeached, it was held that they could maintain such an action, there being a resulting trust to the assignors when the debts were fully paid. *Cook* v. *Smith*, 45 Ch. D., 38.

SHIP—Injury to cargo—Negligence of carrier.—Where a bill of lading contained the following exemptions from

liability, amongst others: "Negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship, whether in navigating the ship *or otherwise*, loss or damage arising from rain, rain storage or contact with other goods being excepted, and the ship not being liable for any consequence herein excepted, however caused or originated," and the goods being loaded on board were injured by negligence on the part of those on board the ship, it was held that the words "otherwise" covered negligence in bringing about excepted loss or damage other than that caused by negligent navigation and the owners were not liable. *Norman* v. *Binnington*, 25 Q. B. D., 475.

WILL—Lost— Probate of.—Probate granted of a lost, will, the subscribing witnesses being dead, and no copy or draft forthcoming, but the existence and contents and the handwriting of testator, and that of witnesses being satisfactorily approved. Possession had been held under will for eight years. Approved on appeal. *Harris* v. *Knight*, 15 Prob. D. 170.

THE

WESTERN LAW TIMES.

VOL. I. NOVEMBER 15, 1890. No. 8.

The Sheriffs of Assiniboia.

PAPER I.

Though the sheriffs of Assiniboia were not, with two exceptions, as far as can be ascertained, men of very exceptional abilities or acquirements, yet we venture to believe that a sketch, necessarily incomplete in many instances from lack of material, of the actions of the various gentlemen who held that important office, will not be lacking in historical interest.

When Lord Selkirk obtained his deed from the Hudson's Bay Company for the District of Assiniboia, on 12th June, 1811, this saving clause was inserted therein: "Saving and reserving nevertheless to the said Governor and Company and their successors, all rights of jurisdiction whatsoever granted to said company by their charter." This accounts for the fact that the commission as Governor was granted to Captain Miles MacDonnell, by the Hudson's Bay Company, and not by Lord Selkirk as has been wrongly (*a*) stated and is generally supposed. He himself states on oath: "I had a commission as Governor from the Hudson's Bay Company under the authority of their charter." This commission he states elsewhere bore date

(*a*) Amos' Report of Trials, etc., at Montreal, pp. 14 and 229, *Regina* v. *Robertson et al.* London, 1820.

the 10th or 12th of June, 1811, evidently the same date as the grant to the Earl (*b*).

The first sheriff of Assiniboia was Mr. John Spencer, but we are unable to state the exact date of his arrival at Red River, or throw any light on his previous history, other than that he was educated at the widely-known Blue Coat School in London, and entered the service of the Hudson's Bay Company early in life. It is most probable, however, that he arrived at Red River at the same time as the Governor, that is in August 1812. The company that same year took the precaution to obtain, on October 1, the opinion of Mr. Justice Holroyd as to the validity of this appointment. His opinion was to the effect that the company could appoint a sheriff as "incident to their power of judicature"; that such sheriff could, in case of resistance to his authority, call out the population to his assistance and arm the servants of the company, and in short perform all the duties of a sheriff. (*c*)

(*b*) Lane's Report of Trials, etc., Montreal, 1818, p. 243. Several writers have described this Governor as being a captain in the Queen's Rangers. This, says Mr. Brymner, Canadian Archivist, in his report for 1886, p. xvii, is incorrect. He received his commission in 1796, from Lord Dorchester, as captain in the Royal Canadian Volunteers. See above report for sketch of his life. The Hon. Commissioner Coltman makes the same statement on p. 154 of Report of 1819, as to his regiment.

(*c*) This opinion was subsequently endorsed by other distinguished counsel, among them the celebrated Sir Samuel Romilly, appointed Solicitor-General in 1806, and in consequence thereof at a General Court held in London at Hudson's Bay House, on May 19, 1815, "for the purpose of taking into consideration an Ordinance for the more effectual Administration of Justice in the Company's Territories," the following resolutions were passed by the proprietors:

First, [Providing for the appointment of a Governor-in-Chief and Council, to have "paramount authority over the whole of the Company's Territories in Hudson's Bay."]

Secondly, [Providing for the administration of justice by the Governor and Council.]

Thirdly, [Similar regulations.]

Fourthly, "That a sheriff shall be appointed for each of the districts of Assiniboia and Moose, and one for the remainder of the Company's

The first occasion in which we see Mr. Spencer appearing at all as figuring in the Red River troubles, is as a signatory to the celebrated proclamation (*d*) of the Governor, issued at Fort Daer, Pembina, and dated January 8, 1814. Here he signs as secretary, however, not as sheriff. Shortly after this in March succeeding, and in pursuance of orders from Sheriff Spencer, a party of fifteen or sixteen of the colonial servants were furnished with arms, and directed to proceed, under the command of Mr. John Warren, to the plains of Turtle River. This party captured two or three sleds loaded with provisions belonging to the North-West Company. The sheriff, in May, subsequently apprehended two free Canadians, Portras and Saucisse, on the Assiniboine river, whither he had gone to search for provisions, but found after some days search only an empty boat with the above men in it, whom he made prisoners and took before the Governor. Under threats of being sent to Hudson's Bay they were compelled to declare on oath where the provisions were secreted ; whereupon the sheriff again went up the river, brought down the goods and added them to the Governor's store. In June, under warrant from MacDonell, he proceeded with an armed force to the junction of the Assiniboine and Souris rivers, where the North-West Company had collected their principal supply of provisions at their post called Riviere la Sourie, and having demanded

Territories, for the execution of all such process as shall be directed to them according to law.

Fifthly, That in case of death or absence of any councillor or sheriff, the Governor-in-Chief shall appoint a person to do the duty of the office till the pleasure of the Company be known."

These resolutions were founded upon and resulted from the above opinions, and the resolutions themselves were submitted to, and approved of by council. (Statement respecting the Earl of Selkirks settlement, p. 133, London, 1817.)

(*d*) Narratives of Occurrences, p. 25, London, 1817. This proclamation related to the food supplies of the settlement and placed certain restrictions on the removal of produce of all kinds from the district, under pain of forfeiture.

the surrender of the supplies and being refused, he broke into the Post, cutting down the stockade with axes and forcing the store room door. The proceeds of the seizure, some 600 packages of dried meat and fat, weighing about 85 lbs. each, were partly taken to the Hudson's Bay Company's post in the neighbourhood, and partly removed to the Forks as before. A warrant having issued at Fort William against Mr. Spencer, at the relation of the North-West Company, for his share in these proceedings, Mr. Duncan Cameron, a partner of that company, arrived at the Forks on Sept. 5, 1814, and having arrested Mr. Spencer thereunder, sent him off the next day to Lac-la-Pluie on the way to Montreal. "In passing Fort Douglas, the colonial servants forced open the store door for arms and ammunition to release him, but he would not allow them to interfere" (*e*). Bills of indictment for grand larceny were found against Mr. Spencer in 1815, which were kept hanging over him for years, till, in company with others accused, in January 1818, he presented a petition to the Governor of Quebec, praying that a commission should issue to try them, and, the North-West Company abandoning further prosecution, a *nolle prosequi* was entered by order of the Attorney-General (*f*).

The proceedings taken against Mr. Spencer on his arrival in Lower Canada may best be told in the words of his adversaries the North-West Company, who cannot be accused of any partiality towards him: ". . . . . Mr. Macdonnell, and the sheriff, Mr. Spencer, were arraigned before the courts of Lower Canada, on the charges on which they had been apprehended; and, in justification of their arrest, a True Bill was found against Spencer for grand-larceny. A plea in bar to the proceedings was put in on behalf of the prisoner, alleging that the charter of the

(*e*) Report 1819, pp. 163 *et al.* Narrative of Occurrences, p. 36.

(*f*) Report of 1819, p. 151.

Hudson's Bay Company authorized the seizure, in virtue of his office; and time was given by the court to procure evidence, and the opinions of legal authorities in England, with respect to the validity of that plea. The defendants were admitted to bail, and, it appearing clearly from opinions subsequently taken in London, that as they might have acted under a misapprehension of authority, there would be a failure in proving against them the *felonious intent*, the prosecution was dropped. . . . . " (*g*).

It may be not out of place to further state that the North-West Company in their letter of Feby. 1, 1816, to the Secretary of State, did not venture to allege more than that the defendants "had acted under a misapprehension of authority" (*h*).

The defendants nevertheless regarded this favourable termination of the prosecution in the light of a victory.

Though one might think that Mr. Spencer had experienced enough hardships during his tenure of office, yet he was appointed at a General Court of the Company in London on May 29, 1822, as one of the sheriffs, not for Assiniboia, but for the rest of the Company's territories. He arrived at Red River the following year, and subsequently rose to the rank of chief trader in the service. Having retired from this position he went to what was then called Canada, and lived for a few years as a private gentleman at Montreal. Finding his resources at an end, he went back to Rupert's Land, re-entered the service and was in charge of Fort George for many years. He spent the winter of 1858-59 in Red River, on the way to Canada for the second time, *via* St. Paul, and lived generally at Goderich, at which place his wife died. The longing for the North-West again came over him, and he returned in 1873 to Red River, dying some years later, about 1880, at

(*g*) Narrative of Occurrences, p. 46.

(*h*) Statement, etc., p. 152.

a very great age, at Poplar Point in this Province, where he is buried in the English churchyard and a tomb raised to his memory, concerning which we may have something to say on another occasion. He married Nancy, third daughter of Chief Factor William Sinclair, of York Factory, Rupert's Land. Her youngest sister, Mary, was the wife of John Inkster, Esq., of Kildonan, Councillor of Assiniboia, and mother of Colin Inkster, Esq., the present sheriff of the Eastern Judicial District of this Province and formerly speaker of the Honorable Legislative Council of Manitoba, to whom we are indebted for these particulars of his family. Mr. Spencer had six sons and four daughters. The sons, Edward, William, John, Rupert, Miles and Charles are living, except the last. The third is in the service of the Company and in charge of Fort Churchill at the present time. In appearance Mr. Spencer was of good height though rather spare, handsome, and of gentlemanly bearing; in manner, refined and courteous, yet brave and determined when occasion demanded, while his information on general subjects was extensive. He was, in short, truly "a gentleman of the old school." It might not be uninteresting to add that he justly prided himself on the beauty of his penmanship which was generally admitted to surpass that of any of the employees of the Company in Rupert's Land.

The departure of Sheriff Spencer from Red River on the date mentioned, (Sept. 5, 1814,) was followed by that of the Governor Miles MacDonell, on June 21, 1815. On June 17, 1815, the H. B. ship, *Prince of Wales*, left Stromness, having on board the new Governor, Robert Semple, and the new, and second Sheriff of Assiniboia, Mr. Alexander McDonnell. Mr. Semple be it remembered, was not merely the Governor of the colony, as was his predecessor Miles MacDonell, but Governor-in-Chief of all the Hudson Bay Company's Territories, appointed in

pursuance of the resolution of May 19 of that year, before referred to, and having "paramount authority" in Rupert's Land. The Governor and Sheriff, with one hundred and sixty colonists and servants, arrived at Red River on Nov. 3, 1815 (*i.*)

Mr. Semple having set out on December 19, of the same year on a tour to inspect the Hudson's Bay posts in the district, left the colony in charge of Colin Robertson. In the absence of the Governor, who was away for about three months, Robertson on March 17, 1816, took possession of the North-West Company's Fort Gibraltar but subsequently restored it to Mr. Duncan Cameron within twenty-four hours, under his promise to abstain from hostilities against the colony. About two days afterwards, on the 19th, says Mr. Pritchard (*j*), "Hugh McLean arrived at the H. B. post at Pembina, from the Forks with a letter from Mr. Robertson to the sheriff McDonnell, informing him that in consequence of having discovered the plans of Mr. Cameron, of the North-West Company, for the destruction of the settlement, he had taken him prisoner, and possession of his fort. A few hours after the receipt of Mr. Robertson's letter, Mr. McDonnell as sheriff, ordered his constables, Duncan McNaughton and Patrick Corcoran, to call into his room such of the servants as he named to them, whom he gave arms, and immediately proceeded to the North-West Company's house. Messrs. White, McLeod, and

(*i*) Report of 1819, p. 176. Mr. McDonnell must not be confounded with another of the same name in the service of the North-West Company, who was in charge of their post at Qu'Appelle and later at Portage des Prairies.

It does not at all appear that the extent of power subsequently enjoyed by Sir George Simpson as Governor of Ruperts' Land, exceeded the "paramount authority over the whole of the Company's Territories" which was exercised by this gentleman. Such a contention requires proof, which has not been adduced as yet, even if proof of a jurisdiction exceeding "paramount authority" be possible.

(*j*) Narratives of John Pritchard *et al*, p. 21, London, 1819.

myself accompanied him. After the sheriff had made prisoners of Pangman, Fraser and Hesse, he desired Pangman to deliver to him the key of the store, upon which he requested one of the North-West Company's servants to open the door and deliver to him all the arms and ammunition, which were conveyed with the prisoners to our fort. An inventory was taken of their stores in presence of the prisoners, and signed by the gentlemen of our party; a copy of which was offered to Pangman but he refused to receive it. The key of the store was likewise presented to him by Mr. McDonell, who said that self defence, and the security of the peoples lives, obliged him to take the step he had done; and that he (Pangman) might appoint any person in whom he had confidence to transact the business of the North-West Company, and that, far from wishing to molest their trade, he would be ready at all times to give them any protection in his power. This offer was repeatedly made, and as often rejected by Pangman. On the second day the prisoners were sent to the Forks; and Mr. James White was ordered to take an inventory of the North-West Company's property, among which was found a gun, claimed upon the oath of George Sutherland as being his property, of which he had been forcibly deprived the preceding spring by Mr. Alexander McDonell, of the North-West Company. The provisions found in the North-West Company's store-house were in part served out as rations to their servants, and the remainder sent down to the North-West Company's partner, Mr. Cameron, at the Forks. When all the North-West Company's servants were about to abandon the house, he requested that we would take charge of the property, which was accordingly brought over to our fort, and afterwards taken down in the boats to Fort Douglas by a written order from Governor Semple to me, stating, that in consequence of the North-West Company having seized

our property at Peace River, it would be necessary to hold something as a pledge for its restoration."

Mr. Robertson, shortly after the liberation of Cameron, again took possession of Fort Gibraltar, on further evidence of hostile intent on the part of the North-West Company, and retained possession of the same. The clerks and most of the servants of the North-West Company left the Forks on April 10. The North-West Company did not tamely submit to these measures, and reprisals quickly followed, the whole country being thrown into a state of anarchy, bordering on open war. On June 10 (*k*), the Governor gave orders for the demolition of Fort Gibraltar which were immediately carried into execution, all the best timber being rafted down to strengthen Fort Douglas, and one bastion and the remainder of the timber burned. The reason for this action on the part of Mr. Semple was that it was deemed impossible to hold both positions, and he determined to concentrate his forces at Fort Douglas. Whatever the object, this determined assertion of the rights of the Hudson's Bay Company precipitated matters and resulted in the treacherous murder of the Governor and his party on the evening of the 19th of June, with the dreadful particulars of which our readers are doubtless sufficiently familiar. During the sanguinary encounter, the sheriff, who had observed the North-West party approaching, watching their movements through a spy-glass from the look-out station in the Fort, was left in charge thereof. After the Governor and party had gone out to meet the North-Westers, they sent back John Bourke to get a three pound field-piece from McDonnell at the Fort, who sent it with Hugh McLean as driver, but before they had gone more than a mile the massacre had already taken place and they fled precipitately back to the Fort, Bourke being wounded

(*k*) Report 1819, p. 182.

and John McNaughton killed. Cuthbert Grant and other leaders of the North-West party finding the colonists terrified by the awful fate of their fellows, induced them to give up the Fort, by threats of a general massacre. The agreement arrived at between Sheriff McDonnell, on behalf of the colonists, and the half-breed leaders, was that if all the public property were given up (both Lord Selkirk's and the H. B. Company's) the colonists would be allowed to depart and that they should be given safe conduct until the North-West Company's track in Lake Winnipeg had been passed. In pursuance of this agreement, McDonnell gave up the Fort, and an inventory of the property being taken, the whole was given up to Cuthbert Grant for the N. W. Company. According to Mr. Pritchard (*l*), about the time the settlers were ready to depart on June 22, Grant stated he had received an order from Mr. Alexander McDonnell, the North-West partner at Portage des Prairies, to detain them till his arrival. Mr. Pritchard entreated him to allow them to depart but in vain. However, on Sheriff McDonnell's observing that he plainly saw Mr. Alexander McDonnell wanted to rob Grant of the honour of the day, Grant's pride was hurt, and he declared in a most intemperate manner, that he would keep his word in spite of Alexander McDonnell, and desired them to depart immediately without waiting for an escort, which would be sent after in a light canoe. The whole party started forthwith, the Sheriff and Mr. Pritchard being furnished with written "protections."

Two days after leaving the colony, the settlers were stopped at Riviere aux Morts (Netley Creek), by Mr. Archibald Norman McLeod, partner of the N. W. Company, on his way from the interior, with a large company in ten light canoes. McLeod instituted an inquiry respecting the capture of the N. W. Company's forts at Pembina

(*l*) Pritchard's Narrative, pp. 34-35, 1819. Report 1819, p. 194.

and the Forks, "and on the information obtained, caused Mr. Sheriff McDonnell to be arrested on an affidavit by Mr. John Pritchard" (*m*), and bailed to appear at Montreal on September 1, if required. On McDonnell's representing himself to be "the only officer with the colonists" and that his presence was absolutely necessary to enable them to proceed, he was, as before stated, admitted to bail, and conducted the colonists to Jack River, now known as Norway House.

(*m*) Report 1819. Pritchard's Narrative.

NOTES AND COMMENTS.

PRIVATE PROSECUTORS.

A remarkable event occurred a few days ago at the Assizes before Mr. Justice Dubuc. In a case of criminal libel about to be brought before the grand jury, a certain counsel applied to the Attorney-General for leave to intervene and conduct the case on behalf of the private prosecutor. The Attorney-General refused the application. Counsel thereupon applied to the court for leave to intervene, but the Attorney-General stated to the court he had refused the request of counsel "because he considered it to be his duty to be very careful that no one should be allowed to act for the Crown unless he could depend upon him to hold the scales of justice evenly. He did not consider that Mr. Hagel was such a man, but on the other hand believed him to be an improper man to entrust such a function to. He had been applied to before several times by persons who desired to have Mr. Hagel conduct cases for the Crown, and had invariably refused the permission for the reason that he deemed him an improper person. He still thought so, and would continue in the future to withhold his consent. In this particular case, however, as it might be suggested that his personal feeling was involved, he had decided to waive his objections and allow Mr. Hagel to conduct the prosecution, Mr. Davis appearing with him to see that fair play was given. He wished it distinctly understood, however, that this course was taken for the special reasons given and was not to be regarded as a precedent."† The bill was thrown out by the grand jury.

† We quote from the report published by a daily paper of this city, to which we refer our readers.

It is true that the counsel stated to the court that he had not made prior applications for leave to intervene, but the Attorney-General maintained his assertions in that connection. The Attorney-General, entertaining as he did the above opinions as to the fitness of counsel, could take no other stand in the bare interests of justice than he did in this instance. He would have been false to his position as the representative of justice had he done otherwise.

There does not appear to be any doubt but that the Crown officers have the sole right to allow a private prosecutor to intervene or not, as they think fit, and the court has nothing to say in the matter. There is a weighty precedent for the course pursued by the Attorney-General. In the most famous trials in the history of the country, which were held at Quebec in 1818, and arose out of the very gravest charges in the calendar, preferred by Lord Selkirk against certain of the employees and agents of the North-West Company, the Earl applied to the Attorney and Solicitor-General of Quebec to be allowed to intervene through his legal advisers. It is unnecessary to say that the issues at stake in these cases were of the utmost magnitude, and the facts lay peculiarly within the knowledge of the noble lord, yet the Crown officers refused the application, saying, "We cannot allow the law advisers of Lord Selkirk to take a part in conducting the prosecutions, or the examination of witnesses, unless we receive instructions from His Majesty's Government to that effect." ‡ The Earl appealed to the Governor, Sir John C. Sherbrooke, who laid the matter before Earl Bathurst, Secretary of State, but without success, and the trials were conducted solely by the Crown officers. We do not hesitate to say that the Attorney-General of Manitoba was right in his action, and this in spite of an attack upon him founded on a misstatement of facts, and a misapprehension of law.

‡ Parliamentary Report of 1819, p. 112.

PORTRAIT OF CHIEF JUSTICE WALLBRIDGE.

The portrait of the Honorable Lewis Wallbridge, the third Chief Justice of Manitoba, has been completed by the artist to whom the work was entrusted, and the profession can now judge of its merits as a work of art and as a likeness, as it hangs in the assize court room. As a work of art, we do not think that it can be highly commended, though the artist has, we believe, spared no pains to make the painting a creditable one. As a likeness, there is no doubt that it is not the late Chief Justice as he was known to the people of Manitoba. This, however, is no fault of the artist's, as the only material he had to work from was a very indifferent photograph, taken some years ago. The figure, nevertheless, is to the life. It is to be regretted that an excellent negative of the judge was unfortunately lost, and none of the copies can be found. All these difficulties but emphasize the necessity of having the portrait of the present Chief Justice painted without delay, and by an artist of established reputation. We again repeat, that, in our opinion, a portrait of the first Chief Justice, the Hon. Alex. Morris, should likewise be added. We will undertake to procure an excellent likeness of him, which can be reproduced on canvas to advantage. The bar has already signified its wish in this connection and that wish should be respected by the governing body. No one wants an incomplete gallery of the Chief Justices of the Province. The thing is absurd.

A POINT OF ETIQUETTE.

The Law Society of Manitoba lately retained two counsel to represent and act for it in an application to strike a certain attorney off the rolls on a very serious charge. This matter is not concluded and is being heard now on a reference by the Court to the Master. A few days ago, at the assizes, the senior of these counsel, Mr. H. M. Howell, and this attorney appeared

together in a certain case; that is, the counsel employed by the Law Society to strike a certain attorney off the rolls, which application is still pending, appeared in the Court of Queen's Bench as being retained by, and acting in conjunction with that same attorney. In our opinion, this is more than unseemly. We wish it understood that it is not the action of the attorney we draw attention to, but that of the prosecuting counsel. We make no comment on the attorney's actions whatever. That matter is *sub judice*, and he is entitled to a fair trial, and to prove his innocence, which we hope he will do for the credit of the profession.

ILLEGAL PRACTICING.

Once more we call the attention of the government and Law Society to the state of affairs in the Land Titles Office, and the class of persons who seek to do business therein for third parties.

Consider carefully the following advertisements. The first a letter heading; the second appears daily in the *Free Press*:

Telephone 398.

J. E. Mills,
Valuator, etc.

W. A. Ducker,
Dom. & Prov. Land Surveyor.

WINNIPEG AND WESTERN REAL ESTATE AND MINING EXCHANGE.

Money to Loan.

543 Main St.

Fire, Life and Accident Insurance.

Special Facilities for Securing Torrens Titles.

City Properties, Farm Lands & Mining Claims for Sale or Exchange. Surveys of all kinds promptly and carefully executed.

Rents and Accounts Collected. Estates Managed.

MILLS & DUCKER.

WINNIPEG, MAN.,.....189..

H. A. JUKES & CO.,
Real Estate Brokers and General Agents. Office: 313 Main St., adjoining Potter House Block, Winnipeg, Man.
P.O. Box 326.

H. A. JUKES, for the past 5 years draftsman in the Land Titles' Office, has opened an office at 313 Main St., next Potter House Block, as a real estate and general agent. Torrens Titles procured for holders of tax deeds; applicants for Torrens Titles will find it to their advantage to employ me, as I am thoroughly familiar with the routine work in the Land Titles' Office, and am expert in all matters pertaining to city titles and city surveys. Any work intrusted to me by solicitors or others will be promptly attended to. Call and see my lists of city properties and farm lands, and leave all yours for sale. P.O. Box 326.

In regard to the first we ask, what do the words "Special facilities for securing Torrens Titles" mean?

In regard to the second, which is the most brazen and flagrant example that has so far come before our notice, we are of the opinion that the advertiser has no right to procure Torrens Titles for applicants, nor can he collect fees for so doing. This is attorney's work beyond question. The inconsequent assumption that because a man has been employed as a mere draughtsman in the Land Titles Office for five years, he is therefore an "expert in all matters pertaining to city titles" and "applicants for Torrens Titles will find it to their advantage to employ" him is really refreshing as an example of "a lame and impotent conclusion." One would almost think from the flourish of his trumpets that the advertiser really examined titles instead of being a draughtsman only.

We hardly think it probable that any solicitor of the Queen's bench in Manitoba, or elsewhere, will see fit to entrust any work of this nature in the Land Titles Office to this modest real estate agent. They may employ him as a draftsman if they like, as it is no part of a solicitor's work to guarantee metes and bounds, which is a surveyor's duty. In such cases the advertiser must be prepared to take the risk of liability for prosecution under the Land Surveyors' Act, which provides for a fine up to fifty dollars for a first infringement thereof. The drawing of papers for hire in an application for title,

comes clearly within the provisions of the conveyancing Act, and renders the advertiser liable to a fine of twenty dollars for each offence. If any of the legal profession should so far forget their duty as to employ the advertiser to procure Torrens Titles, we remind them that by so doing they render themselves to be struck off the rolls, and "the unqualified person" to be committed to the common jail for one year. If any such case should come to our knowledge, we shall not fail to take notice of it and see that it is presented to the Law Society in a way that will ensure action being taken. Common courtesy also demands that the profession should do nothing that would clash with the Land Surveyors. It is not proper that solicitors should encourage unqualified persons at the expense of gentlemen duly certificated and competent to act.

Some protection must be afforded the public from unlawful practitioners, and recent developments in cases before the court, show the really great danger of having practically no check upon these gentry and leaving the public at their mercy. The officials in the Land Titles Offices should bear these facts in mind and not countenance any transactions in their offices by persons not competent by law to act in the premises.

A BOORISH JUDGE.

Certain timorous persons appear to shrink from the bare idea of a legal journal speaking plainly and boldly on questions affecting the welfare of the public and the legal profession. We are glad to print for the benefit of all such, an article from the very able and independent *Indian Jurist*, in evidence of the fact that no such narrow views are held in India. We hope that the Chief Justice of Madras will in the future so courteously conduct himself towards the bar that he will not be subjected to another rebuke as scathing and bitingly sarcastic as the present

one. Boorish and domineering judges, should read the words of *The Indian Jurist* carefully, and ponder on them.

"Unquestionably it is the duty, as it is the pleasure, of a strong judge to deliver from time to time, as occasion may seem to require, short judgments touching the conduct, ability, and good sense of those who are called upon to assist him in the arduous task of administering justice. Otherwise it would be almost impossible for him to keep these persons in order, to save the time of the court, and to secure a tolerably decent appearance for the quarterly statements of work done. And hence it is that the Chief Justice of Madras occasionally says things that at the first may seem somewhat rude and unfeeling towards his inferiors, but nevertheless must greatly conduce to the furtherance of justice, and the growth of popular respect for our tribunals. Thus at one time he curbs the impetuosity of counsel by an expressive look, and the order 'Sit down, sir.' On another occasion, the bar generally is likened to 'common bricklayers.' On another, an experienced barrister who innocently suggests in the course of an elaborate argument that a collector misappropriated (in the sense of wrongly applying) certain temple funds, is told that, if the suggestion were not on the face of it so silly, the court would strike it out of the record as improper. And so on and so on. In all these cases sensible people will see no more than a strong and vigorous intellect properly asserting itself in vindication of the majesty of the law. *And, if a suspicion should occur to any that possibly it may have been a little rough on Chokalingam* to get him convicted after he had been duly acquitted by his peers, it will suffice to remember that discipline must be maintained. And, after all, Chokalingam probably is a very common fellow.*

THE LAW STUDENTS' SOCIETY.

We are glad to see that the law students are taking steps to form a society under the above name. They held a meeting in this city on the 3rd instant to consider the matter and decide upon steps to be taken. Messrs. Wrigley, Mulvey, and Hart-McCuag, were appointed a committee to draft a constitution and present the same to a meeting to be held on the 24th instant. We understand that a course of lectures is desired, and we believe that such would be of great assistance to the students. We wish the society every success, it will encourage a lively interest in the study of

*Referring to the case of a native who had been acquitted by the jury, yet Collins, C.J., refused to accept the verdict and ordered a new trial by a fresh jury, who convicted!

the law, and cannot fail to be most beneficial to all taking part in its exercises.

THE NORTH-WEST BAR.

The disallowance of ordinances relating to the North-West Bar, is not very encouraging to lawyers who have become residents of the Territories. We are not in favor of the narrow sectarian spirit that restrains lawyers from practicing in Dominion courts unless they belong to the Provincial bar where the court is sitting. It seems strange that the Dominion should yield, especially in criminal matters, to the Province in regulating the membership of the bar and the officers of the court. Although we regard it as an impossibility now, yet we would like to see a complete interchange of the right of counsel to be heard in any province of the Dominion. In other words, a Dominion bar instead of a local one. The present system cultivates a spirit of provincialism. The interchange would result in a greater degree of harmony in the procedure in the provinces and would tend to cultivate the study of jurisprudence. However, if Manitoba, Ontario and the other provinces have restricted bars, our North-West brethern are entitled to the same privileges. Not that the principle is agreeable to us, but the present position is an unfair one to them. Some protection surely should be afforded them.

REVISION, NOT CONSOLIDATION.

In our comment last month, under the above caption, we unwittingly did an injustice to the Attorney-General's Department. Before we wrote as we did, we saw the original notification by the Government to the commissioners of their appointment to "consolidate" the statutes. Nothing was said about "revision or classification." It now appears that the commission itself authorizes a "revision, consolidation and classification." Two at

least of the three commissioners were under our impression, so that we were quite justified in the remarks we made. At the same time, justice demands this explanation, which we give in order to place the matter correctly before our readers.

FLOTSAM AND JETSAM.

PRECEDENCE AT THE BAR.

We give pages three and four of the prothonotary's roll of barristers. The names in brackets are omitted from the secretary of the Law Society's roll as explained in our October issue :

(3rd page.)

[H. MacMahon],	do.	" "	16 "
A. E. Richards,	Winnipeg,	Easter Term,	7th June, 1882.
G. W. Baker,	"	"	8 June, 1882.
[John H. Bell],	Emerson,	"	"
[F. W. Barrett],	Winnipeg,	"	"
[Ernest V. Bodwell],	Winnipeg,	"	"
[John Carey],	Winnipeg,	"	"
T. D. Cumberland,	"	"	"
Colin H. Campbell,	"	"	"
[F. C. Clemow],	"	"	"
L. W. Coutlee,	"	"	"
[W. B. Dingman],	"	"	"
[C. A. Durand],	"	"	"
[Edwd. Elliott],	"	"	"
[A. W. Finkle],	"	"	"
[David Glass],	"	"	"
Chester Glass,	"	"	"
G. R. Howard,	"	"	"
[W. C. Hamilton],	"	"	"
J. Stanley Hough,	"	"	"
T. C. Johnstone,	"	"	"
W. Redford Mulock,	"	"	"
G. G. Mills,	"	"	"
A. Lemon,	"	"	"

R. W. Jameson,	Winnipeg,	Easter Term, 8 June, 1882.	
W. Franklin Morphy,	"	"	"

(4th page.)

Hugh J. Macdonald.		"	"
L. McMeans.		"	"
J. B. McLaren,	Nelsonville,	"	"
J. B. McArthur,	Winnipeg.	"	"
Henry Nason,	"	"	"
George Patterson,	"	"	"
W. E. Perdue,	"	"	"
[G. Byron Philip],	"	"	"
Jas. J. Robertson,	"	"	"
H. Vivian,	"	"	"
J. W. H. Wilson,	"	"	"
[George A. Watson],	"	"	"
[Fitzgerald Cochrane],	"	"	"
Corbet Locke,	Nelsonville,	"	June 9th, 1882.
L. G. McPhillips,	Winnipeg,	Trinity Term, August 28th, 1882.	
A. E. McPhillips,	"	"	"
Edgar C. Goulding,	"	"	"
Joseph Martin,	Portage la Prairie,	"	"
Ghent Davis,	Winnipeg,	"	"
Jas. A. Ross,	"	"	"
G. B. Gordon,	Winnipeg,	"	"
John Rowe.	"	"	"
J. Stewart Tupper,	"	"	"

(End of 4th page.)

[*To be continued.*]

HOPELESS IGNORANCE.

It appears to be a hopeless task to endeaver to hammer into the heads of some old country people the fact that Manitoba is not in the Republic to the south of us. We lately received a letter from an incorporated company in London, addressed: "Manitoba, United States." That was bad enough, but read the following printed wrapper, received monthly, which places the whole of Canada there, and then come and weep with us at the want of geographical knowledge in the British Isles.

FROM E. PONSONBY,
Law Bookseller and Publisher,
116 GRAFTON ST., DUBLIN.

—. —. ————, Esq.,
Law Library,
Winnipeg, Man.,
CANADA, U.S.A. (!)

A STARTLING SENTENCE.

The following sentence appears in the last issue of *The American Law Review* and is taken from the report of the special committee on the History of the Bench and Bar of New Mexico. It was delivered by Chief Justice Benedict of New Mexico, on a notorious criminal, convicted of a brutal murder with absolutely no mitigating circumstances. After some quaint remarks the judge proceeded:

" . . . The sentence of the court is that you be taken from this place to the county jail, that you be there kept safely and securely confined, in the custody of the sheriff, until the day appointed for your execution. Be very careful, Mr. Sheriff, that he have no opportunity to escape and that you have him at the appointed place at the appointed time. That you be so kept, Jose Maria Martin, until—Mr. Clerk, on what day of the month does Friday, about two weeks from this time, come? 'March 22d, your honor,'—very well, until Friday, the 22d day of March, when you will be taken by the sheriff from your place of confinement to some safe and convenient spot within the county, that is in your discretion Mr. Sheriff, you are only confined to the limits of the county, and that you there be hanged by the neck until you are dead, and—the court was about to add, Jose Maria Martin, 'may God have mercy on your soul,' but the court will not assume the responsibility of asking an All-Wise Providence to do that which a jury of your peers refused to do. The Lord couldn't have mercy on your soul. However, if you affect any religious belief, or are connected with any religious organization, it might be well enough to send for your priest or minister and get from him—well—such consolation as you can, but the court advises you to place no reliance upon anything of that kind. Mr. Sheriff, remove the prisoner.

A POLITICAL LANDLADY.

We take the following from the *Chicago Legal News*, which credits it to the *Ohio Law Bulletin :*

"A curious instance as to the manifold purposes for which the remedy by injunction may be resorted to, was reported last week from Indianapolis. It was reported that Jesse Hamrick and Wilson Morrow, young democratic lawyers of Indianapolis, are plaintiffs in a peculiar libel suit in the Superior Court of that city. They allege that they are democrats, and intend to vote the democratic ticket at the coming election ; that Mrs. Sutton, with whom they are boarding, is a republican ; that knowing they cannot find another boarding house in the precinct, and if they move their residence they will lose their votes, she has demanded that they vacate their room in her house, and go elsewhere to take their meals. They further claim that she has no cause of complaint against them except that they are democrats, and that her only object in ordering them to leave her house is to deprive them of their suffrage at the coming election. Mrs. Sutton admits that she is a republican, but denies that politics had anything to do with her action toward her boarders. The court granted a temporary injunction pending the hearing of the case."

It will now be in order for these enterprising gentlemen to apply to the same court for a writ of prohibition to restrain the cook from allowing more than the legitimate number of hairs to appear in the soup, and to obtain a mandamus to compel the landlady to furnish proper certificates of birth, to prove that the spring chickens supplied to the hungry guests, were not present at the Battle of Bunker's Hill.

English Decisions.

November 17, 1890.—Owing to the non-arrival of the November Law Reports we are unable to give the usual monthly digest. The journal has been delayed awaiting the last English mail, but the numbers have not come. Next month will contain the usual instalment together with delayed issues. [Ed. W. L. T.]

Books for Review.

English Constitutional History from the Teutonic conquest to the present time. By Thomas Pitt Taswell-Langmead, B. C. L., Oxon. Fourth edition revised throughout, with notes and appendices, by C. H. E. Carmichael, M. A., Oxon., etc. London—Stevens & Haynes, 1890. Cl. 8vo, 21s.

THE

WESTERN LAW TIMES.

VOL. I. DECEMBER 15, 1890. No. 9.

Parliamentary Government in the North-West Territories.

There is a time in the history of every colony of British origin, in every clime, when Britons demand their inheritance, the right of self-government. This will only end when the whole of Greater Britain is parcelled out into self-governing communities. In Australia as in Canada the same demand has repeatedly come with very little variation in form, with very few limitations, until what was twenty years ago an unknown land is now a self-governing body, bound only to the mother country by the slenderest of ties, the same silken thread that binds all the other colonies to her. When will this end? Australia, we see, can hardly ask for more and maintain British connection. There the end has come. In Canada, too, what was twenty years ago given over in popular literature to polar bears and savages, although of the latitude of Paris, a *terra incognita*, now appears upon the scene, points out that its climate in some places is probably the finest in Canada, and asks for responsible government. The population of the Territories at a census taken in 1884-5 was: whites, 23,344; half-breeds and Indians, 25,018; making in all, 48,363. The whole population of its immediate predecessor, Western Australia, is variously estimated at between 40,000 and 60,000.

English Decisions.

November 17, 1890.—Owing to the non-arrival of the November Law Reports we are unable to give the usual monthly digest. The journal has been delayed awaiting the last English mail, but the numbers have not come. Next month will contain the usual instalment together with delayed issues. [ED. W. L. T.]

Books for Review.

ENGLISH CONSTITUTIONAL HISTORY from the Teutonic conquest to the present time. By Thomas Pitt Taswell-Langmead, B. C. L., Oxon. Fourth edition revised throughout, with notes and appendices, by C. H. E. Carmichael, M. A., Oxon., etc. London—Stevens & Haynes, 1890. Cl. 8vo, 21s.

THE

WESTERN LAW TIMES.

VOL. I. . DECEMBER 15, 1890. No. 9.

Parliamentary Government in the North-West Territories.

There is a time in the history of every colony of British origin, in every clime, when Britons demand their inheritance, the right of self-government. This will only end when the whole of Greater Britain is parcelled out into self-governing communities. In Australia as in Canada the same demand has repeatedly come with very little variation in form, with very few limitations, until what was twenty years ago an unknown land is now a self-governing body, bound only to the mother country by the slenderest of ties, the same silken thread that binds all the other colonies to her. When will this end? Australia, we see, can hardly ask for more and maintain British connection. There the end has come. In Canada, too, what was twenty years ago given over in popular literature to polar bears and savages, although of the latitude of Paris, a *terra incognita*, now appears upon the scene, points out that its climate in some places is probably the finest in Canada, and asks for responsible government. The population of the Territories at a census taken in 1884-5 was: whites, 23,344; half-breeds and Indians, 25,018; making in all, 48,363. The whole population of its immediate predecessor, Western Australia, is variously estimated at between 40,000 and 60,000.

English Decisions.

November 17, 1890.—Owing to the non-arrival of the November Law Reports we are unable to give the usual monthly digest. The journal has been delayed awaiting the last English mail, but the numbers have not come. Next month will contain the usual instalment together with delayed issues. [Ed. W. L. T.]

Books for Review.

English Constitutional History from the Teutonic conquest to the present time. By Thomas Pitt Taswell-Langmead, B. C. L., Oxon. Fourth edition revised throughout, with notes and appendices, by C. H. E. Carmichael, M. A., Oxon., etc. London—Stevens & Haynes, 1890. Cl. 8vo, 21s.

THE

WESTERN LAW TIMES.

VOL. I. . DECEMBER 15, 1890. No. 9.

Parliamentary Government in the North-West Territories.

There is a time in the history of every colony of British origin, in every clime, when Britons demand their inheritance, the right of self-government. This will only end when the whole of Greater Britain is parcelled out into self-governing communities. In Australia as in Canada the same demand has repeatedly come with very little variation in form, with very few limitations, until what was twenty years ago an unknown land is now a self-governing body, bound only to the mother country by the slenderest of ties, the same silken thread that binds all the other colonies to her. When will this end? Australia, we see, can hardly ask for more and maintain British connection. There the end has come. In Canada, too, what was twenty years ago given over in popular literature to polar bears and savages, although of the latitude of Paris, a *terra incognita*, now appears upon the scene, points out that its climate in some places is probably the finest in Canada, and asks for responsible government. The population of the Territories at a census taken in 1884-5 was: whites, 23,344; half-breeds and Indians, 25,018; making in all, 48,363. The whole population of its immediate predecessor, Western Australia, is variously estimated at between 40,000 and 60,000.

English Decisions.

November 17, 1890.—Owing to the non-arrival of the November Law Reports we are unable to give the usual monthly digest. The journal has been delayed awaiting the last English mail, but the numbers have not come. Next month will contain the usual instalment together with delayed issues. [ED. W. L. T.]

Books for Review.

ENGLISH CONSTITUTIONAL HISTORY from the Teutonic conquest to the present time. By Thomas Pitt Taswell-Langmead, B. C. L., Oxon. Fourth edition revised throughout, with notes and appendices, by C. H. E. Carmichael, M. A., Oxon., etc. London—Stevens & Haynes, 1890. Cl. 8vo, 21s.

THE

WESTERN LAW TIMES.

VOL. I. . DECEMBER 15, 1890. No. 9.

Parliamentary Government in the North-West Territories.

There is a time in the history of every colony of British origin, in every clime, when Britons demand their inheritance, the right of self-government. This will only end when the whole of Greater Britain is parcelled out into self-governing communities. In Australia as in Canada the same demand has repeatedly come with very little variation in form, with very few limitations, until what was twenty years ago an unknown land is now a self-governing body, bound only to the mother country by the slenderest of ties, the same silken thread that binds all the other colonies to her. When will this end? Australia, we see, can hardly ask for more and maintain British connection. There the end has come. In Canada, too, what was twenty years ago given over in popular literature to polar bears and savages, although of the latitude of Paris, a *terra incognita*, now appears upon the scene, points out that its climate in some places is probably the finest in Canada, and asks for responsible government. The population of the Territories at a census taken in 1884-5 was: whites, 23,344; half-breeds and Indians, 25,018; making in all, 48,363. The whole population of its immediate predecessor, Western Australia, is variously estimated at between 40,000 and 60,000.

English Decisions.

November 17, 1890.—Owing to the non-arrival of the November Law Reports we are unable to give the usual monthly digest. The journal has been delayed awaiting the last English mail, but the numbers have not come. Next month will contain the usual instalment together with delayed issues. [ED. W. L. T.]

Books for Review.

ENGLISH CONSTITUTIONAL HISTORY from the Teutonic conquest to the present time. By Thomas Pitt Taswell-Langmead, B. C. L., Oxon. Fourth edition revised throughout, with notes and appendices, by C. H. E. Carmichael, M. A., Oxon., etc. London—Stevens & Haynes, 1890. Cl. 8vo, 21s.

THE

WESTERN LAW TIMES.

VOL. I. . DECEMBER 15, 1890. No. 9.

Parliamentary Government in the North-West Territories.

There is a time in the history of every colony of British origin, in every clime, when Britons demand their inheritance, the right of self-government. This will only end when the whole of Greater Britain is parcelled out into self-governing communities. In Australia as in Canada the same demand has repeatedly come with very little variation in form, with very few limitations, until what was twenty years ago an unknown land is now a self-governing body, bound only to the mother country by the slenderest of ties, the same silken thread that binds all the other colonies to her. When will this end? Australia, we see, can hardly ask for more and maintain British connection. There the end has come. In Canada, too, what was twenty years ago given over in popular literature to polar bears and savages, although of the latitude of Paris, a *terra incognita*, now appears upon the scene, points out that its climate in some places is probably the finest in Canada, and asks for responsible government. The population of the Territories at a census taken in 1884-5 was: whites, 23,344; half-breeds and Indians, 25,018; making in all, 48,363. The whole population of its immediate predecessor, Western Australia, is variously estimated at between 40,000 and 60,000.

Probably the next census will show that there are 40,000 whites in the Territories. This being a most favorable estimate, it seems somewhat strange that these forty thousand should undertake to govern an area far exceeding the most populous of the Western European states. But then we are accustomed to govern areas rather than populations. We regard the air space contained in a map as the most important consideration in the extension of government, rather than the clouded areas of density of population. Undoubtedly the government of the former is easier than that of the latter.

In this article we propose to briefly trace the government of the Territories since the transfer of Rupert's Land to the Dominion government, the numerous minor epochs in such government, the organization of the present system, the causes of dissatisfaction at present existing, and the basis of the demand for responsible government. We may say that it is exceedingly difficult to separate the main issues in the present struggle from the mass of verbiage that surrounds them.

The first Act of the Parliament of Canada passed in 1869, relating to "such portion of Rupert's Land and the North Western Territory as is not included in the Province of Manitoba," provided that the government should be that of a Lieutenant-Governor, with extensive powers therein set out, together with a council of not more than fifteen or not less than seven persons, appointed by the Governor-General, with such powers as may be conferred upon them. Several changes were made continuing this Act, making the Lieutenant-Governor of Manitoba by commission that of the North-West Territories, and increasing the maximum number of councillors to twenty-one(*a*). In 1880 the statute was consolidated, and pro-

(*a*) 32 & 33 Vic., c. 3, secs. 2, 3, 4; 33 Vic., c. 3, sec. 36; 34 Vic., c. 16, secs. 1-5: Orders-in-Council printed in Stats. Canada, 35 Vic., p. xlxiii; 36 Vic., c. 5, sec. 4.

vision made that (*b*) as soon as the elected members representing 1,000 of a population numbered twenty-one, the nominated assembly should cease. This contained the earliest provisions relating to the election of members. It was the first step towards responsible government. In 1886 the statute was re-consolidated (*c*). In 1888 the nominated council was entirely abolished, and it was declared that "the government should consist of a legislative assembly" for the North-West Territories, which "shall have the powers and perform the duties heretofore vested in and performed by the council of the North-West Territories," composed of twenty-two elected members and three legal experts, who have no vote; and, further, that the assembly should continue for three years (*d*). It was further provided "that the Lieutenant-Governor shall select from among the elected members of the legislative Assembly four persons to act as an advisory council on matters of finance, who shall severally hold office during pleasure; and the Lieutenant-Governor shall preside at all sittings of such advisory council and have a right to vote as a member thereof, and shall also have a casting vote in case of a tie" (*e*). It will be observed that the advisory board is only one relating to "matters of finance." Further, section fourteen provides that all money bills shall originate by message of the Lieutenant-Governor, and also that the Lieutenant-Governor-in-Council shall have only such powers as the Governor-in-Council shall by order-in-Council confer, not exceeding those conferred on provinces under the B. N. A. Act (*f*). This, then, is the government as at present existing.

We now propose to consider the causes of dissatisfaction at present existing. It is admitted by both sides that

(*b*) 43 Vic., c. 25, s. 32. (*c*) 49 Vic., c. 50.

(*d*) 51 Vic., c. 19, sec. 2. (*e*) 51 Vic., c. 19, sec. 13.

(*f*) R. S. C., c. 50. "No such ordinance shall be made which is inconsistent with or alters or repeals any provision of any Act of the Parliament of Canada in force in the Territories."

there are certain revenues arising from both local and federal sources; that over the one, those of a local nature, the right of the advisory board to virtually control the expenditure is justified and is exercised, provided the majority would act. But over the disposal of the revenues or monies voted by the government of Canada for a particular purpose in the Territories, the right is disputed. These funds are expended from Ottawa, regardless of the existence of the Lieutenant-Governor, the advisory board, or the assembly at large. These Federal monies have been mainly expended for schools and bridges, and by an order-in-council of July 18, 1890, the school funds were directed to be expended in accordance with an ordinance of the North-West Territories.

On the question as to whether the Advisory Board is responsible both to the Lieutenant-Governor, and also to the Assembly, these facts must be considered. All money bills must be suggested by the Lieutenant-Governor. He must sit alone, for he is no longer the presiding officer of the assembly, but simply chairman of the advisory board, in fact, his position is as much analogous to the position of a lieutenant-governor-in council, in single chamber governments in any of the other provinces. as it is possible to be. We may call the advisory board on "matters of finance," a cabinet or ministers of the Crown, but to create the same institution, it is not necessary to call it by the same name. It appears to us, therefore, that in all respects the advisory board, as far as matters of finance of a local nature are concerned, has all the essentials of an ordinary local government cabinet. We wish to be distinctly understood that we are not considering its position as far as Federal revenues are concerned. This being so, are we to expect, because the Territorial Act does not distinctly say so, that the principles of British constitutional government are not to apply? It is admitted that they are responsible to the Lieutenant-Governor, for they shall be selected from

among the elected members of the legislative assembly, and "shall hold office during pleasure." "The old constitutional maxim that "the king can do no wrong," "is now literally true, for his acts are really the acts of his ministers, and his ministers are responsible to the House of Commons."(*g*) This rule must apply to our miniature parliament, that in question. As it at present stands, the majority board has resigned on the question of the control of the Federal funds, and a minority board is in its place. It is true that the finances must apparently be administered with the assistance of an advisory board, and that the majority will not consent to serve. However, we know of no rule in English parliamentary practice which permits, once responsibility is admitted, of allowing a minority cabinet. This is aside from the question as to the justness of the majority's claim to regulate the Federal grant, which for reasons hereinafter given, we do not admit. But the issue must be confined to the issue. If there is a deadlock, on the question of supplies, that is not the first time in English constitutional history, that supplies have been stopped. We venture to say that in England to-day, a recalcitrant sovereign and House of Lords, would be brought to terms by just such a means. If there is a deadlock, then the law must prevail, not a question of expediency. As to the question, whether the assembly has the right to control the Federal funds, we cannot but say that the position taken by Sir John Thompson in a report to the Governor-General, dated the third day of January, A. D., 1890, advising the disallowance of an ordinance of the majority assembly purporting to deal with monies voted by and expended under the control of the parliament, of Canada, is both able and impregnable. There has been no settlement of a funded debt or revenue upon the Territories such as has taken place in Manitoba.

(*g*) Taswell-Langmead Const. Hist. of England, 4th Ed., p. 711; Todd Parl. Gov. in Eng., ubique.

There has been no absolute delegation of the general powers, usually granted by the Dominion Government to local legislatures under the B. N. A. Acts, 1867-1886.

The voting of monies for the payment of salaries of judges in the different provinces stands upon very different grounds from that of voting monies for school purposes in the North-West Territories. The one is voted for a distinctively federal purpose, the other is the administration of local affairs by the central body, which has not yet delegated it. In fact, we might as justly say that the provinces have an abstract right to assume the control of the payment of the salaries of the judiciary as that of the North-West Territories to control the funds in dispute in the present instance.

We do not claim that the advisory board possesses all the features of a cabinet, but it does seem to us that as far as matters of finance are concerned the board is responsible to the house as well as to the Governor. The assembly is not responsible for a defective statute not giving wider powers, nor are they responsible that there is no advisory board for "matters of legislation." The fact remains that there is a board for a particular purpose responsible for a particular purpose. We would indeed be surprised to find that the assembly had full power and control over legislation and then to find the statute construed, in the absence of express words, that with the power to originate money bills, the right to expend the money without regard to the assembly was gone too. In order to deal with a number of questions arising out of the main issue, but probably of a higher nature than those already dealt with, our remarks must be deferred to a future issue.

(*To be concluded.*)

The Lieutenant-Governor's speech on the opening of the assembly; the reply thereto; the further communication of the Lieutenant-Governor in reference to the disallowance of certain ordinances, and the reply thereto; the various state papers of the Minister of Justice for Canada in reference to such disallowance, are variously referred to throughout.

NOTES AND COMMENTS.

A LATE ISSUE.

We make no apology for the lateness of this issue. It is impossible for our subscribers to have judgments given on December 22, published on December 15. By delaying publication to this date we have succeeded in two objects, one, that of giving the very latest decisions at the very latest possible moment; the other that of reporting all cases that have been decided up to the Christmas vacation. Had we not done so, our readers would not have had these decisions for a month to come. We wish it to be distinctly understood that this journal will be published monthly, as near the fifteenth as possible, but the publishers reserve the right to delay publication for a convenient period to meet the objects above stated.

HAVE WE A STAR CHAMBER?

On the 19th inst., two gentlemen of the Bar of this Province, who are also members of the Law Society in good standing, requested the assistant-secretary to let them inspect the following documents:

1. Report presented by the Examining Committee, dated 12th Dec., 1890, returning by-law dealing with alteration in the curriculum.

2. The by-law above referred to, read a third time on said date, and numbered "20."

3. Letter of R. D. Richardson containing amended offer for printing the Society's reports.

4. The communication of Mr. Morrow, dated Nov. 8, 1890, and referred to the Discipline Committee.

Will it be credited that the assistant-secretary informed these gentlemen that he had orders not to let members

of the Society inspect or even see any of its papers or proceedings, and that only the meagre and unsatisfactory minute-book of the proceedings of the Benchers was open to the members! On being asked if there were any authority for such an extraordinary proceeding, he explained that he was only following out his instructions, and that while there was no rule of the Society in this respect, he was acting simply on the verbal orders of the President and Secretary. Naturally indignant at such an unjustifiable and unwarrantable assumption on the part of these officers of the Society, and feeling that this was a matter which concerned the profession at large, and that an important right was here in jeopardy, a formal notification of these facts was immediately laid before the Benchers, and the right of the members of the Law Society, to see and inspect all papers and documents whatsoever of their Society, asserted in such commuuication.

The following resolution was then passed by the Benchers:

"That any members of the Society be given access to all documents and proceedings of the Society, except tenders before decision and matters affecting conduct of members of the Society before the determination of same."

Now this is good as far as it goes, and is a smart rebuke to the unduly officious and presumptuous act of the President and Secretary, but it does not go far enough. We maintain and assert that there should be no limitation whatever, and that no papers should be kept back from the members, excepting *sealed* tenders, to be opened on a certain day in pursuance of prior resolutions to that effect. None others should be withheld. No possible harm can result from the members of the Law Society seeing at any stage any complaints that may be lodged against one of their number. Any objections to all publicity in the matter, will, if examined, be proved to be founded on a wrong hypothesis of unnecessary concealment.

Is not every member of the community, including lawyers, open to have a charge laid against him at a police station by any one who thinks himself agrieved, and is not such a charge open not only to the inspection of the profession, but to the world at large? Are not newspapers permitted to examine such proceedings and to present them to the public in a legal manner, and within the provisions of the law? Does any honest citizen slumber uneasily because some one may see fit to drag him before the police court, in the full blaze of publicity, on a serious charge? Is it the honest or the dishonest man who fearfully apprehends the light of strict investigation? Will not the upright be vindicated in due course, and the accuser discomfited? Then why use the pigeon holes of the assistant-secretary of the Law Society of this progressive Province as a sort of lion's mouth in which to stuff in secrecy the complaint of a client, and there to lie till weeks roll by and the Benchers in their wisdom have decided as to whether a *prima facie* case for them to interfere has been made out or not?

"Publicity of judicial proceedings," says the eminent authority, Best, "is a feature in English law," and here beyond all question, we have a tribunal which is judicial in its operations and whose judgments are fraught with the gravest consequences to the whole community.

Rightly or wrongly the impression prevails in the public mind to a greater or less degree, that the investigations of the Benchers, as they are now conducted, are not wholly beyond outside influences, and in some recent cases there are grounds for fears that the laity is justified in holding this belief. Mr. Justice Falconbridge referred in plain terms to the unfortunate prevalence of this feeling in a recent notorious case in Ontario, and it will doubtless prevail here to a greater extent till this harmful and most injurious system is abolished, and all proceedings made open and above board *ab initio.*

We do not care what practice prevails in other Law Societies. If a contrary prevail it is in opposition to the requirements of the legal profession in this new country, who court, as honest and high-minded men do, a rigorous inquiry into their dealings with the public. While we do not advocate the publication of such matters, yet, is not the press of this province daily entrusted with the reporting of charges of the utmost gravity laid in the police court, and all the courts of Manitoba, against the most respected citizens, and would not the people rightly denounce any attempt to deprive them of this means of their being made acquainted with the course of the administration of justice? Shall it be then admitted for a moment that the gentlemen of the legal profession are not to be trusted with the full facts of a charge laid against a member? We scornfully repel such a debasing proposition. It is humiliating in the extreme. Let the members of the Law Society, then, insist upon their rights, brush away a reproach from their profession, and admit the light of day into the secret and mysterious conclaves of the governing body, on matters which effect at every stage, and not merely at the end, the honor and self-respect of the Bar of Manitoba. †

Finally, for the credit of the Bar of Manitoba, we venture to assure the public that the great body of the legal profession is not in sympathy with this deplorable policy of secrecy, which furnishes a weapon of suspicion and dis-

† The proceedings of the Law Society in Ontario are regularly published in the *Canada Law Journal* by the Society and paid for by it. A casual reference only is needed to see that the stifling process is not in vogue there, as by-laws, reports and tenders are published. Nor do we lack a precedent in regard to keeping back names of members whose conduct is affected, even "before the determination" of the matter. On p. 20 of the *Canada Law Journal* we find the following entry: "Mr. Hoskin presented the report of the Discipline Committee on case of Mr. E. Meek, which was received and ordered for consideration, on Saturday, 26th inst.

trust to be used against, and to discredit us. On the contrary, it courts inquiry into all its actions either as individuals or as members of the Law Society of Manitoba. Let the Bar look to it, then, that their wishes are respected by their representatives.

BENCHERS OF THE LAW SOCIETY.

There having been a number of changes in the governing body since the election in May, 1889, we give the list as it now stands:

President—J. A. M. Aikins, Esq., Q. C.
Treasurer—A. E. Richards, Esq.
Secretary—Isaac Campbell, Esq., Q. C.

T. S. Kennedy, Esq., Q. C.	W. J. Cooper, Esq.
J. H. D. Munson, Esq.	J. D. Cameron, Esq.
Alex. Haggart, Esq.	W. E. Perdue, Esq.
Frank S. Nugent, Esq.	J. B. McLaren, Esq.
T. M. Daly, Esq., Q. C.	

PROFESSIONAL ADVERTISING.

Punch for April 19, 1890, very truly said that "the advertising barrister may best be defined as the living and pushing embodiment of self assertion and impudence." We heartily concur in this expression, as applied to England, and also, beyond a certain limit, to Canada. It is the universal practice in America for professional gentlemen to print, or engrave, on their note paper their name and occupation. Many of them also insert a brief card in a newspaper. Beyond this point we think *Punch's* remarks apply, especially as they are levelled at touting and newspaper advertising of that description. Anything approaching this, or sensational advertising, is not in accordance with the etiquette of the profession in Canada. *The Canadian Law Times* for April last, p. 88, says: "Sensational advertising is a growing evil, and not without a harmful effect upon the whole profession; here is ground

for action but though many instances are brought directly to the notice of the Benchers they pass without observation." The unusual practice, adopted by a few solicitors, of displaying a string of solicitorships on their letter heads, while we are glad to say that it is of very limited extent indeed, yet is an evidence of bad taste not to be passed over. Likewise the printing of a solicitor's name on the outside of an envelope. These and other similar practices should be frowned down by the profession as tending much to detract from proper legal dignity. We have several examples of this "sensational" character which have been sent to us by our correspondents from various parts. We propose in the future to give all such the benefit of a free advertisement. Look at this for a nice specimen of a letter heading from the North-West Territories, and the advertiser an English solicitor at that:

W. L. BERNARD,
Barrister-at-Law, Advocate, Solicitor,
Conveyancer, Notary Public,
Actuary, etc.

Registrar of Births, Marriages and Deaths.
Issuer of Marriage Licenses.

Probate and English business transacted. Loans negotiated.

Calgary, Alberta, Canada,

.....189..

As the advertisement now stands we are left in doubt as to where the scope of his operations ends. Would it be inopportune to add "Mangling done here?" It is not out of place to note that in the same issue of the *Canadian Law Times* above quoted, in which sensational advertising is condemned, the following advertisement—we had almost said circus poster—is allowed to disfigure its columns, as to our surprise it does also the title page of such a high class publication as the *Albany Law Journal* for Nov. 22, 1890:

WELDON & McLEAN,
Barristers and Attorneys, Notaries Public,
St. John, New Brunswick, Canada.

Solicitors in New Brunswick to the Bank of Montreal; Canadian Pacific Railway Co.; New Brunswick Railway Co.; Shore Line Railway Co.; Western Union Telegraph Co.; Merchants Insurance Co. (Marine); Union Insurance Co. of Bangor, (Marine).

Chas. W. Weldon, M.A., D.C.L., Q.C., M.P.
Hugh H. McLean, Referee in Equity.
General Agents Guardian Fire & Life Assurance Company of London, England.

There seems to be a variance here between the principles which govern the editorial and the job departments of the *Canadian Law Times.*

But for a pretty sample of legal touting we present our readers with the following extract from the pages of the London *Law Times* for Sept. 27, 1890:

LAW—PARLIAMENTARY PRACTICE.

To Country Solicitors, Clerks to Local Municipal Authorities, and others.—A well-known London Firm of Solicitors and Parliamentary Agents are OPEN to MAKE ARRANGEMENTS with Country Firms on very favourable terms, for the introduction and carriage of private Bills through Parliament; unlimited funds at command for financing thoroughly sound undertakings; references exchanged. Address "Lex," 33 Gloucester crescent, Regent's Park, London.

TIMELY EXPRESSIONS.

At a meeting of the Junior Bar (who, by the way, have originated all the reforms in the Law Society), the following resolution was adopted on February 1, last:

"That the County Court Act be revised, and that a simple procedure for appeals be provided."

No action was taken on this timely suggestion, and as a consequence, we had to face the lamentable state of affairs which very reluctantly forced us to pass some severe strictures on the Court of Queen's Bench of this Province. It may not be out of place to say that the *Albany Law Journal* accepting our statement of the case as correct, as

it was, remarked that the court was "quite too technical for the promotion of justice," and that "it is fortunate for the legal profession that there are some lawyers who are not afraid of the judges," and, "it is well that the legal profession have 'organs' which do not 'move on' at the command of the bench. The *Indian Jurist* stigmatized the proceedings as "highly improper and undignified." We are pleased to find our position justified by such impartial critics, especially as our duty on that occasion was a painful one. On the other hand, it is with much gratification that we give exceptional publicity, and call attention to, the following vigorous and impressive remarks of the Hon. Mr. Justice Killam, in the case of *Mulvihill* v. *Lachance*, reported in this number :

"I trust that the next session of the Legislature will not pass without an amendment of the practice relating to appeals from the county courts. If it is deemed proper that there should be the right to appeal, it is desirable that it be given upon such conditions as will make it a reality, instead of a snare to involve unfortunate litigants in a needless expense. It is a disgrace to the administration of justice that so much time should be wasted in the courts in the consideration of such objections as we have so frequently been obliged to give effect to, in respect of these appeals, and some other applications to the court. I hope that some more elastic practice will be provided which will leave to some one some discretion in this matter."

May this enlightened spirit long continue to permeate our courts !

A BAR DINNER.

It is to be regretted, that as matters now stand, the various members of the bar actually have no day in the year on which they can meet and discuss their own affairs. Let us remedy this defect and have a day and time appointed once in each year when the bar, if not of the whole

Province, which we would like to see, at least the members of it who live in the capital of Manitoba could assemble and cultivate mutual acquaintance. Nothing could better answer this object than an annual meeting of the profession, to be held shortly before the meeting of the Legislature, and there could be no more fitting termination of such a meeting than a dinner. We have a very good example set us in the meetings of the bar associations of the various states across the border. Such a meeting would be productive of good results in many ways. It would bring those together in conviviality who would otherwise meet only "on the tented field" of legal warfare, it would foster a spirit of kindliness, strengthen the already high position of the legal profession in the community, and raise a generous *esprit de corps* among the members of the Law Society. It is too late now, perhaps, to have a regular meeting. It is not too late to have a dinner at which a plan of procedure could be decided on for future years, and matters affecting the welfare of the profession considered. We feel sure that this proposition will commend itself to our readers.

LAW STUDENTS' SOCIETY.

The following officers of the Law Students' Society have been elected for the ensuing year :

W. R. Ross, President.
D. H. Urquhart, Vice-President.
Wm. Hart-McCarg, Sec.-Treas.

FLOTSAM AND JETSAM.

PRECEDENCE AT THE BAR.

We give the concluding pages of the prothonotary's barristers' roll. The names in brackets are wrongly omitted from the secretary of the Law Society's roll.†

(5th page.)

Alexander Howden,	"	" " " "
W. J. Cooper,	Portage la Prairie,	" " " "
Geo. W. Beynon,	Minnedosa,	" " 29th, "
[T. C. L. Armstrong,]	Winnipeg,	" " 31st, "
P. McCarthy,	"	" " " "
W. E. Macara,	"	" " " "
[Geo. Claxton,]	Gladstone,	" " " "
Joseph Curran,	Winnipeg,	" 9th September, 1882.
Isaac Campbell,	Winnipeg,	Michaelmas Term, 6 Nov., '82.
[Clifford Sifton],	Brandon,	" 6 Nov., '82.
[Geo. R. Coldwell],	Winnipeg,	" 6 Nov., '82.
Jno. MacBeth,	Winnipeg,	" 6 Nov., '82.
[Geo. L. Taylor],	Winnipeg,	" 6 Nov., '82.
J. D. Cameron,	Winnipeg,	Michaelmas Term, 10 Nov., '82.
G. W. Allan,	Winnipeg,	" 10 Nov., "
Frank S. Nugent,	Winnipeg,	Hilary Term, 8th Feby., 1883.
[R. T. McLean],	Winnipeg,	" "
W. D. Ardagh,		
[James A. Miller],		
C. P. Wilson,	Winnipeg,	Hilary Term, Feby. 15th, 1883.
[A. L. Sifton],	Brandon,	Easter Term, 6 June, 1883.
[R. Hill Myers],	Minnedosa,	" " "
C. H. Allen,	Winnipeg,	" 7 " "
James Fisher,	"	" 11 " "
[W. A. Macdonald],	Brandon,	" 16 " "

(6th Page.)

[Victor A. Robertson],	Portage la Prairie,	Trinity Term, 5 Sept., 1883.
E. H. Morphy,	Winnipeg,	Trinity Term, 8 Sept., 1883.
R. L. Ashbaugh,	Winnipeg,	Trinity Term, 8 Sept., 1883.
Horace E. Crawford,	Winnipeg,	Trinity Term, 8 Sept., 1883.
T. H. Gilmour,	Winnipeg,	Trinity Term, 14 Sept., 1883.
A. V. McCleneghan,	Winnipeg,	Trinity Term, 14 Sept., '83.

[John Boultbee],	Portage la Prairie,	Michaelmas Term, 7 Nov. '83.
John C. F. Bown,	Winnipeg,	Michaelmas Term, 13 Nov., '83.
Joseph W. E. Darby,	"	Hilary Term, 5th Feb., 1884.
[John P. J. Jephson,]	"	" " "
W. A. Taylor,	"	" " "
J. H. Brown,	"	" " "
Geo. F. Munroe,	"	" " "
Arch. McKay,	Emerson,	" 11th Feby., 1884.
T. Mayne Daly, Jr.,	Brandon,	" 14th Feby., 1884.
[Charles L. Shaw],	Winnipeg,	Easter Term, 2 June, 1884.
Thomas Robinson,	"	" 3d " "
Charles W. Blanchard,	"	" 3d " "
[A. M. Peterson],	Brandon,	Easter Term, June 2, 1884.
Harold Turnbull,	Winnipeg,	" June 3rd, 1884.
[James Robinson,]	Rat Portage,	Easter Term, June 2nd, 1884.
[Henry J. Dexter],	Winnipeg,	Easter Term, June 9th, 1884.
W. H. Long,	"	" " "

(7th Page).

A. E. Wilkes,	Winnipeg,	Michaelmas Term, Nov. 24, '84.
N. D. Beck,	Winnipeg,	Michaelmas Term, Nov. 24, "
John Russell,	Brandon,	Michaelmas Term, Dec. 5, '84.
[D. H. Cooper],	Brandon,	Michaelmas Term, Nov. 24, '84.
John H. Agnew,	Winnipeg,	Michaelmas Term, Nov. 24, '84.
[Jeremiah Travis],	Winnipeg,	Michaelmas Term, Oct. 6, '84.
Fred F. Forbes,	Winnipeg,	Easter Term, June 2, '85.
F. H. Phippen,	Winnipeg,	Easter Term, June 3, '85.
J. Denovan,	Winnipeg,	Easter Term, June 3, '85.
William J. Tupper,	Winnipeg,	Hilary Term, February 1, '86.
R. Ross Sutherland,	Winnipeg,	Hilary Term, February 1, '86.
T. O. Townley,	Winnipeg,	Hilary Term, Feby. 1st, 1886.
R. G. MacBeth,	Winnipeg,	Hilary Term, February 1, '86.
James J. Conacher,	Winnipeg,	Hilary Term, February 1, '86.
John P. Curran,	Winnipeg,	Hilary Term, February 3, 1886.
E. P. Davis,	Winnipeg,	Easter Term, May 17th, 1886.
Alfred J. Andrews,	Winnipeg,	Easter Term, May 17th, 1886.
Jas. MacKay,	Winnipeg,	Easter Term, May 17th, 1886.
Fred C. Wade,	Winnipeg,	Easter Term, May 17th, 1886
G. B. Coleman,	Winnipeg,	Easter Term, May 17th, 1886.
Wallace McDonald,	Winnipeg,	Easter Term, May 17, 1886.
Geo. A. Elliott,	Winnipeg,	Easter Term, May 18, 1886.
G. H. West,	Winnipeg,	Easter Term, May 18, 1886.
J. R. Haney,	Winnipeg,	Trinity Term, Sept. 29th, 1886.
C. W. Bradshaw,	Winnipeg,	Michaelmas Term, Dec. 11, '86.
D. S. Whitman,	Winnipeg,	Michaelmas Term, Dec. 11, '86.
R. W. Dodge,	Winnipeg,	Hilary Term, Feb. 16, 1887.

Smith Curtis,	Portage la Prairie,	Hilary Term, Feb. 25th, 1887.
James H. Howden,	Winnipeg,	Easter Term, May 20th, 1887.
Archer Martin,	Winnipeg,	Michaelmas Term, Nov. 30, '87.
R. W. Harris,	Winnipeg,	" "
W. A. Galliher,	Winnipeg,	" "

(8th Page).

H. A. MacLean,	Winnipeg,	Hilary Term, Feb. 8th, '88.
B. E. Chaffey,	"	" Feb. 10th, 1888.
D. A. Macdonald,	Portage la Prairie,	" Feb. 14th, 1888.
A. McLeod,	Winnipeg,	Easter Term, 28th May, 1888.
John Graham,	"	" " "
Gregory Barrett,	"	Michaelmas Term, 26 Nov., '88.
R. A. Bonnar,	"	Hilary Term, 4th Feby., 1889.
H. Acheson,	"	" 5 Feb., 1889.
A. E. Beck,	"	" 7 Feb., 1889.
J. T. Huggard,	"	Easter Term, 6th May, 1889.
Robert S. Moss,	"	" 7th May, 1889.
T. G. Mathers,	"	Trinity Term, 8th July, 1889.
R. J. Wilson,	"	" 8th July, 1889.
A. N. McPherson,	"	" 8th July, 1889.
E. Anderson,	Portage la Prairie,	" 13th July, 1889.
H. W. Herchmer,	Winnipeg,	Michaelmas Term, 25 Nov., '89.
R. M. Matheson,	Brandon,	Hilary Term, 3rd Feb., 1890.
I. Pitblado,	Winnipeg,	" 6th " "
A. Whealler,	Winnipeg,	Easter Term, 13th May, 1890.
O. H. Clark,	"	" " "
J. E. Porter,	Winnipeg,	Trinity Term, 17th July, 1890.
M. L. Grimmett,	Winnipeg,	Michaelmas Term, 25 Nov., '90.
T. W. Taylor, Jr.,	Winnipeg,	Michaelmas Term, 25 Nov., '90.
J. H. Haverson,	Carman,	Michaelmas Term, 6 Dec., '90.

† In the list of names given on page 172, "W. B. Dingman" should be "R. B. Dingman," and "T. C. Johnstone" should be "S. C. Johnstone."

A SUSSEX JURY IN 1655.

One of our subscribers kindly sent this clipping from the *The Portsmouth Times* for Nov. 8 last:

"The following is a verbatim list of a Sussex jury actually returned in the time of the Commonwealth. Their *goodly Christian* names call for no further comment: Approved Frewen, of Feltham; Be Thankful Maynard, of Brightling; Be courteous Cole, of Pevensey; Safety on High Seat, of Uckfield; Search the Scriptures Moreton, of Salehurst; More Fruit Fowler, of East Hoathly; Free Gift Mabbs, of Chittingly; Increase Weeks, of Cuckfield; Restore Weeks, of the same; Kill-sin

Pemble, of Westham; Elected Mitchell, of Heathfield; Faint-not Hurot, of the same; Renewed Wishing, of Havelham; Return Millward, of Hellingly; Fly-debate Smart, of Waldren; Fly-fornication Richardson, of the same; Seek Wisdom Wood, of the same; Much Mercy Cryer, of the same; Fight the good fight of Faith White, of Ewhurst; Small Hope Biggs, of Rye; Earth Adams, of Warbleton; Repentance Avis, of Shoreham; Peace of God Knight, of Burwash; Faithful Frost, of Hastings."

A TRANSCENDENTAL-AESTHETIC ?

In the recent case of *Emerson* v. *Bannerman*, 1, North-West Terr., R. 41, the Hon. Mr. Justice McGuire delivered himself as follows:

"The learned counsel endeavoured to show by syllogistic illustrations that the use of the words "the creditors," entirely changed the meaning of the affidavit, overlooking the fact that in cases of universal negatives the logicians say that both subject and predicate are disturbed. I do not know that Mr. Bannerman is a logician, or if so, to what school he belongs; whether to an Ancient or a Modern School; whether he is to be classed as an Aristotelian, an Epicurean, or a Heraclitic-Protagorean; whether his mind is of the Rhetorico-Sophistical, or Spenozistic-Metaphysical, or simply Transcendental-Aesthetic order; or is he, like so many in these Territories, a lover of Bacon? The evidence does not enlighten us on any of these points, nor do I think the omission material. The power of being able to divide a hair 'twixt south and south-west side, may be interesting to sophistical rhetoricians who have leisure and taste for such subtleties. I do not think we should avoid a bill of sale by reason of the possibilities suggested here."

CONVOCATION NOTES.

The Benchers assembled in convocation on the 24th and 25th days of November last, and the 5th, 12th and 19th days of December, instant.

Nov. 25—

Mr. W. E. Perdue was elected a Bencher, in the place of Mr. H. J. Macdonald, resigned.

Mr. J. B. McLaren was elected a Bencher, in the place of Mr. Ghent Davis, resigned.

Dec. 5—

Mr. R. D. Richardson's amended offer for printing Manitoba Reports was accepted (in so far only as vol. vii is concerned) viz : $1.00 per page for first 200 copies, ten cents per page for each succeeding 100 copies., the whole edition to be the exclusive property of the Law Society. The committee declined to recommend a three years contract as asked for.

[This is the "amended offer" elsewhere noticed, of which inspection was wrongfully refused. We are not much surprised, under the circumstances, as the way in which this printing contract was renewed, after creating great dissatisfaction, without giving the best printing firms in the city an opportunity of tendering for it, ought not to be passed over, and an explanation is in order from the Reporting Committee. We know of one firm of printers, at least, who consider themselves as being unfairly dealt with, and will state circumstances if desired.—ED.]

The assistant-secretary was instructed to prepare labels for the shelves in the library and a catalogue of the books, and to ascertain the cost of printing same.

Messrs. Perdue and Munson were appointed a committee to wait on Chief Justice Taylor and ask his consent to the Law Society having his portrait painted.

A motion by Mr. Cameron, in amendment, seconded by Mr. Richards, that the further consideration of the

matter be postponed to the second day of next term was lost.

Dec. 12th—

The committee appointed to wait on Chief Justice Taylor reported that he had consented to the proposal of the Law Society to paint his portrait.

The examining committee reported that they had prepared a by-law in conformity with certain suggestions made by the examiners in regard to the curriculum. The by-law was passed, dated this date and numbered 20. It repeals rules 17, 18 and 19, and substitutes other important provisions therefor. We have no space to reproduce it here, and no provision has been made for the printing or publication of such matters in this journal, as is customary elsewhere. It is of considerable importance to students at law and articled clerks, and comes into force on the last day of Trinity Term, 1891.

[This is the report and this is by-law which were witheld from the inspection of the members of the Law Society! Comment is superfluous. A yearly election of Benchers is the only cure for this sort of thing.—ED.]

Dec. 19—

Messrs. Munson, Kennedy, Nugent and Haggart were appointed a committee to arrange matters with the lecturers who offered to lecture to the students.

[This is a good move, and is in answer to a petition presented by the students. The Bar at the meeting held in February last, put itself on record in this matter. The gentlemen composing the committee, will, the students may rest assured, do everything that is possible to assist them in their studies.—ED.]

It was ordered "that any members of the Society be given access to all documents and proceedings of the Society, except tenders before decision and matters affecting the conduct of members of the Society before the determination of same."

[Our remarks on this order will be found on another page of this issue.—Ed.]

TERM BRIEFS.

MICHAELMAS TERM.

The following gentlemen were called to the bar:

Thomas Wardlaw Taylor, Junior.
Martin Luther Grimmett.
James Henderson Haverson.

Epitome of English Decisions.

COUNSEL—Compromise of suit by.—Counsel having compromised a suit by misapprehension, in that the terms did not strictly follow the settlement agreed upon, and an order having been taken out, it was held that though the settlement appeared to be a good one for both parties, yet the order could not be enforced. *Lewis* v. *Lewis*, 45 Ch. D, 281.

INNKEEPER—Lien—Wife's property.—Where a husband and wife stayed at an hotel and the wife had baggage, her separate property, it was held that although credit was given to the husband who partially paid the bill, yet the wife's baggage having been brought to the hotel at the time when the husband and wife were guests, the lien attached. *Gordon* v. *Silber*, 25 Q. B. D., 491.

MORTGAGE—Interest—Arrears—Reversionary interest.—Where reversionary interests in personal estate were mortgaged with a covenant for payment of principal with interest at five per cent. on a specified day, with no provision for subsequent interest, and no interest was paid,

and an action was brought for redemption fourteen years after date of foreclosure, it was held that the mortgagor could only redeem on payment of interest at said rate for the full fourteen years. *Mellersh* v. *Brown*, 45 Ch. D. 225.

PRINCIPAL AND AGENT—Liability of principal.—Where a party advanced money to an agent in good faith, and without notice that the agent was not obeying or intending to obey the mandate of his employers, the loan would be one by which having regard to their authority to their agent, they would be bound. *Montaignac* v. *Shitta* 15 App. Ca. 357.

PRACTICE—Inspection of documents.—A defendant in an affidavit on production of documents stated he had certain documents in his possession that related solely to his own title and did not in any way tend to prove or to support the title of the plaintiff. Held : that there was no authority for going behind that statement. *Morris* v. *Edwards*, 15 App. Ca. 309.

STATUTORY BODY—Liability.—The liability of a statutory body is governed by the statute creating it, and for mere nonfeasance no action lies except in regard to a duty towards the plaintiff imposed by statute and negligently omitted. *Gibraltar* v. *Orfila* 15 App. Ca. 400.

STOPPAGE IN TRANSITU—Vendor's right.—Where goods are intended by the purchaser to pass direct from the vendors' possession to that of a carrier, to be carried to a destination, contemplated by both parties, the goods are in transitu until the destination is reached. *Lyons* v. *Hoffnung*, 15 App. Ca. 391.

WRITTEN INSTRUMENT—Evidence to contradict.—Where there is simply a conveyance and nothing more, the terms upon which the conveyance is made not being apparent from the deed itself, collateral evidence may easily be admitted to supply the considerations for which the parties interchanged such a deed ; but where in the deed itself the reasons for making it, and the considerations for which it is granted, are fully and clearly expressed, the collateral

evidence must be strong enough to overcome the presumption that the parties in making the deed had briefly set forth the causes which led to its execution. *Barton* v. *Bank N. S. W.*, 15 App. Ca. 381.

BOOK REVIEWS.

English Constitutional History: From the Teutonic conquest to the present time. Designed as a text book for students and others, By T. P. Taswell-Langmead, B. C. L., of Lincoln's Inn, Barrister-at-law, formerly Vinerian Scholar in the University, and late Professor of Constitutional Law and History, University College, London. Fourth edition revised throughout, with notes and appendices. By C. H. E. Carmichael, M. A., Oxon, Stevens and Haynes, Bell Yard, Temple Bar. 8 vo., 21 s.

The fourth edition of this valuable work has just been published. As in the case of the third, it is edited by Mr. Carmichael, and we are glad to see a demand for it so soon after the last, published in 1886. It speaks volumes for the merit and appreciation of the book. The work is so well known to lawyers and to the reading public, that it is qu.te unnecessary for us to join in the universal praise which has been accorded it. In this edition the particular feature is the addition of really very valuable appendices, full and complete, and written in a very happy style. Singularly appropriate too, have been the editorial emendations and additions of Mr. Carmichael. He seems never to have forgotten, as sometimes occurs, that he was editing the book, not writing it, and has been just to the memory of his old friend. We observe that the editor perceives that English constitutional history does not end in England, and that the "kin beyond the sea" are cap-

able of throwing interesting side lights upon the development of the constitution of the mother land. He also does not forget that nowhere is experimental legislation carried on with so much safety to national stability, as among the polities, which are the outgrowth of the British commonwealth. This may be because of national characteristics, but we rather think that it is due to the traditional respect for government, as our inheritance from our common mother land. Appendix J is entirely taken up with a valuable criticism of our article on "A Constitutional Limitation," May, 1890. We regret that it was so much adulterated with local matter, but then it was written amid the influences of current events.

OBITUARY.

We have to record the death of George Albert Fletcher Andrews, Esq., barrister at law, of this city, on Nov. 22, last. The unfortunate gentleman was drowned between five and six o'clock of that day, with his newly married wife, in the Assiniboine river, about two hundred yards above the Main Street bridge. They had gone skating, and in the dusk skated into an open space in the river, and were carried under the ice. The body of Mr. Andrews was recovered at one o'clock on Sunday morning, and that of Mrs. Andrews at the same hour that afternoon. Mr. Andrews was an alderman of this city, representing ward one. He and his wife were accorded a civic funeral, and were interred on the Tuesday following in St. John's cemetery. He was the first member of the city council who died in office.

Mr. Andrews was born at Oshawa, on the first day of April, 1865, and was the eldest son of the Rev. Alfred Andrews, now of Virden, in this Province, minister of the Methodist church. He was called to the Ontario Bar, and coming to Manitoba in 1880, was called to the Bar of this Province in Hilary Term, February 15, 1881. He was married twice. First, to Eleanor, eldest daughter of Mr. F. P. Roblin, of this city, who died in California in February, 1888, and left a daughter, Eunice; secondly, on May 21, last, to Mamie, youngest daughter of the Rev. Alexander McBean, of this city, minister of the Presbyterian church.

The untimely death of Mr. and Mrs. Andrews created a profound sensation. Resolutions of condolence and sympathy were passed by the Benchers assembled in convocation, and by the Mayor and Council.

THE

WESTERN LAW TIMES.

VOL. I. JANUARY 15, 1891. No. 10.

Parliamentary Government in the North-West Territories.

(*Concluded.*)

At the close of our comments on this subject last month, it was intimated that "in order to deal with a number of questions arising out of the main issue, but probably of a higher nature than those already dealt with, our remarks must be deferred."

The era now existing, is purely one of transition and development. Between the extremes of irresponsibility and responsibility in a new country, nothing else can exist. The former gradually wanes, the latter waxes in brilliancy. The one is the setting, the other the rising sun. To dwell upon, and justify the present condition of affairs, would only be the fitting of ill-cut garments upon a useless figure, useless, because it must soon be cast aside.

The question then arises out of the main issue : when shall responsible government be granted ? The reply must be, only when it is expedient and just. If there are dangers in granting responsibility, then, if these dangers can be provided against with proper safeguards, responsible government should be given. Can these be guarded against ? The answer is mainly the object of this paper.

We know how irksome paternal government is, to those accustomed to self control. That then is the position

of the inhabitants of the North-West. They have all emigrated from self-governing countries, and therefore, they are better adapted for the responsibilities for self-government, than those who are the subjects of autocrats. The population of the cities and towns there, we know from personal experience, to be a higher class, socially and educationally speaking, than most western countries. The universities of the old and new worlds have contributed numbers of their graduates to swell the quota. They may be young men yet, but many of them are graduates not unworthy of their alma mater. The professions are remarkable for the standing of their members, exceedingly creditable to a new country. This, we maintain, is an important feature, entirely overlooked in granting self-government. The question then, is not, and should not be, the number of uneducated people, probably incapable of self-government, but the number of educated persons, capable of ruling and taking part in the public affairs of the country. In other words, what are the capacities of the people for self-government? There are "no masses to educate, our masters," but there are educated men capable of being entrusted with self-government.

This being the case, it might be asked: How is it that the veto power of the Governor-General has been so frequently used to anul improvident legislation? The answer is not that the legislation so vetoed is only improvident, illegal or unjust, but also because of the imperfect system of government at present established there. One of the characteristics of "parliamentary democracies" established upon the model of the British Constitution is like it, they have virtually, an unwritten constitution, with the evident intention that the main features of government shall be defined, but that the general rules and procedure of English Parliamentry Government shall apply. This is one of the principles at work in the development and

adjustment of the B. N. A. Act, to the wants of the Confederation. But there is great difficulty in applying precedents of English monarchal origin, to governments, so variously constructed, as for instance, the one in question. Then, too, we forget that there is no law or power in Canada which is really the acknowledged protector of vested interests. The people sometimes require to be saved, not from themselves, but from their legislators. In England, it is often pointed out, that the House of Lords is the guardian of vested rights, and is representative of them. If that protection were dropped out of the British Constitution, there would undoubtedly be a request for something that would supply its place in part. It would leave a gap, apparent and visible, a source of weakness, unless the interests which it represents were protected. In colonial democracies, of the single chamber type, that gap, if they were modelled on the British Constitution, must therefore exist (*a*). This leads us then, to observe, how is the gap to be filled. If we were to follow example, the United States would demonstrate that it should be filled by limitations upon the legislative powers of the governing bodies.

In England, private property is fully protected by the body already mentioned. In the United States by limitations. In Canada, we have in many of the Provinces, neither the one safeguard or the other. It may be objected that limitations are foreign to the nature of colonial democracies. This is a mistake. The transfer of Rupert's Land by the Hudson's Bay Company to the Dominion Government, furnishes a direct answer to this. When the agreement between the Dominion Government and the Company was confirmed by Order-in-Council, both Imperial and Colonial, that Order-in-Council confirmed an agreement, which provided that "the Company is to be at

(*a*) See Taswell-Langmead Const. His. Eng. 4th Ed., Appendix J.

liberty to carry on its trade without hindrance in its corporate capacity, and no exceptional tax is to be placed on the Company's land, trade or servants, nor any import duty on goods introduced by them previous to the surrender" (*b*).

This was a direct limitation in favor of the Company, a special exception to protect their rights. It is not a privilege, but simply a safeguard.

Numerous other instances might be pointed out, chief among which are the clauses of the B. N. A. Act, 1867, applied to the Province of Manitoba by the Manitoba Act. . . "the said Legislature may exclusively make laws in relation to education, subject and according to the following provisions:

"1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the Union."

"2. An appeal shall lie to the Governor-General, etc."

These are the well-known provisions under which Roman Catholics claim the right to separate schools, and which it is admitted by all parties to the controversy prevent the Manitoba Legislature from passing a Public School Act, requiring *compulsory attendance* from all classes (*c*). The clauses relating to the French language are other examples (*d*).

(*b*) Deed of Surrender, H. B. Co. to Dominion Government, sec. 11. See decision thereon, Manitoba Reports, *temp.* Wood, *H. B. Co.* v. *Attorney-General*, p. 209.

(*c*) It may be said *en passant*, that it is claimed that the very effect of this limitation is raising the vital question as to whether The Public Schools Act, Man. 1890, is not being partly nullified in its effect by this clause in a manner not contemplated or foreseen by those who caused its insertion in the constitution. The result seems to be that the schools are separate but the sole rights gone are those of leving taxes for their maintenance and of partaking in the Government Grant for Educational purposes.

(*d*) Canada Act, 33 Vic., c. 3, sec. 23. To what extent these limita-

Such then is the gradual recognition in practice of the compensating system, above referred to, of limiting the power of Canadian Legislatures by express enactment. This apparent digression has been with this object, if the principle is recognized by practice in favor of corporations and classes or sects, why not recognize it in the case of the private individual, the representative of a large class?

The veto power has been used in the North-West, by the Governor-General-in-Council, on three distinct occasions, where proper protection could have been given in a more satisfactory manner by proper legislation. An Ordinance was passed exempting from seizure, for six years, an immigrant's effects, for debts incurred prior to the removal (*e*) This was vetoed upon the usual grounds. Another Ordinance, one relating to the Protection of Game, was vetoed as being in conflict with the Indian Treaties. A third was vetoed because it placed certain

---

tions upon the absolute legislative power of the Provinces within the accustomed limits are being exercised in favour of corporations, the curious may observe that when certain territory was added to the Province of Manitoba out of Rupert's Land by the Dominion Government, an express provision that "the lands of the Company (meaning the Canadian Pacific Railway) in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown" (44 Vic., c. 1, D. 1881, schedule), and especially in connection with this the able dissenting judgment of Mr. Justice Killam, *Can. Pac. Ry. Co.* v. *Mun. of Cornwallis*, 7 Man. R. at p. 74.

(*e*) "No judgment or action for debts, contracted outside of the North-West Territories, shall be enforced against any settler coming into the said North-West Territories within six years of the date of his arrival; provided always that nothing herein shall prevent the collection of debts contracted outside the North-West Territories for goods purchased to be brought into the said Territories and provided further that nothing herein contained shall affect the rights of mortgagees, and shall not apply to debts nor contracts acknowledged in the said Territories, provided nevertheless, that the Ordinance respecting limitations of actions shall not run during the said six years." N. W. T. O., No. 28, 1884.

disabilities upon lawyers who were non-residents, preventing them in fact from practicing in the Territories.

All these can be reduced to examples of a particular class for which a general rule can be applied. For example: It would be easy to prevent the Indian Treaties being violated, by inserting a limitation corresponding to those in the United States constitution preventing States from disregarding their contracts, a most salutary and useful provision.

Then, again, the lessons that could be learned from a careful investigation of the weaknesses in the development of legislation in Manitoba, could be applied. One of the most apparent, is the dangerous use of retroactive legislation, remarkable too, that the most grievous examples of this have occurred, not in the first ten years of the infancy of the Province, but of the last. In this case, especially, we find the necessity for actual legislative interference instead of the veto. The latter is of no avail after two years, and hence, except in flagrant examples, the power is not used. We may say that many Acts of the Legislature of Manitoba are in force to-day, containing provisions more violent than many that have been vetoed. All these point out that, dangers in the exercise of power under responsible government can be readily ascertained. That being so, there is no reason why they can not be guarded against in the proper and only way, that is by actual legislation or limitation on the part of the higher authority. But this is the point we proposed to consider. We trust that our consideration may, at least, tend in some slight degree towards the accomplishment of a most honourable, just and dignified demand, that of the right of responsible government.

NOTES AND COMMENTS.

THE INAUGURAL LECTURE.

The Chief Justice of Manitoba must have felt very gratified at the large audience which assembled in the Assize Room at the Court House, on Friday night last, at eight o'clock, to hear his inaugural address, delivered to the law students of Manitoba. The spacious room was well filled, not only by the legal profession, but by the general public as well, including, we were glad to see, many ladies. Among those present, were the Honorable Lieut.-Governor and Mrs. Schultz, Mrs. Taylor, the Hon. Mr. Justice Bain, the Hon. Mr. McLean, Provincial Secretary, Mr. J. W. Taylor, U. S. Consul, the Rev. Mr. Cloutier, and Mr. J. H. Ashdown. The lecture, though not long, lasting about forty minutes, was listened to with great attention, and very favorably received. At the close of it, the Chief Justice was heartily applauded, and a vote of thanks was moved by Mr. Mulvey, student at law, and seconded by Mr. Ross, president of the Law Students' Society, expressing the great pleasure and gratification the students had experienced in having the course of lectures opened under such favorable auspices. The students are to be congratulated on the excellent manner in which the proceedings were carried out. Messrs. Ross, Hart-McCarg, Royal, Mulvey and Bradley, students at law, acted as ushers, and the completeness of their arrangements for the comfort of the audience was the subject of very favourable comment. We feel sure that the subsequent lecturers will be much encouraged by the success and appreciation of the first, and we trust that they will receive as large and attentive an audience.

We are glad to see that this old practice of the judges lecturing to the law students, which was so successfully and advantageously instituted by the late Chief Justice Wood, is now revived after years of desuetude.

On Tuesday evening, Mr. A. E. McPhillips delivered the second lecture on the list arranged by the Lecture Committee. Mr. Kennedy, Q.C., introduced the lecturer who took "Common Law Practice" as his subject. The students and others who were present were fortunate enough to hear one of the best and most interesting lectures that has been delivered in this city on a legal subject. Mr. McPhillips was followed throughout by his audience with much attention, and we take pleasure in testifying to the able manner in which he dealt with the branch of law under consideration. A great part of his address was necessarily introductory, as he will read the second paper on the same subject on Friday next, the 16th inst., at the same hour and place. On resuming his seat, the lecturer was most warmly applauded, and a vote of thanks moved by Mr. J. Obed Smith and seconded by Mr. G. Patterson, students at law, was tendered him with appropriate expressions by the chairman. We take a special pleasure in referring to the very favourable impression created by Mr. McPhillips, in that it is due to him that these lectures were established, as he was the first to advocate such a course, by moving a motion to that effect at the Bar meeting held in February, 1890. We congratulate him on the realization of his efforts in this behalf.

BAR MEETING.

The adjourned meeting of the Bar met, in pursuance of a week's notice given by the secretary of the Law Society, on Saturday afternoon last in this city. Strange to say, when the meeting was called to order at half-past

four, not thirty gentlemen had assembled though a few dropped in later. We suppose the rush of work after vacation was the reason for the smallness of the meeting. The Honorable the Attorney-General was present and also the following benchers: Messrs. Aikins, Campbell, Nugent, Kennedy and Perdue. Mr. Aikins, president of the Law Society took the chair and Mr. William Bain acted as hon. secretary. The following motion, after some discussion, was

Moved by Mr. Perdue, seconded by Mr. Archer Martin, "that the imposition of law stamps in the present state of the law is wrong in principle, harsh and oppressive, and that law stamps should be abolished."

Carried unanimously.

Moved by Mr. Darby, seconded by Mr. Cumberland, "that a committee consisting of Messrs. Davis, Perdue, Archer Martin, Cassidy, Cumberland, and Phippen, should interview the Bar, the Attorney-General and others, relative to the imposition of law stamps, and prepare a resolution to submit to the next meeting of the Bar, in accordance with their best views."

Carried unanimously.

Moved by Mr. Archer Martin, seconded by Mr. McPhillips, "that except in the case of sealed tenders, all books, papers, documents, and proceedings of the Law Society, be open to the inspection of its members, without any reservation whatever."

In supporting the motion the mover referred to the facts set out in our December issue, pages 183-4-5-6-7, and upheld the right of the members of the Law Society to inspect its proceedings as set out in the resolution. In addition to the arguments given in our last issue (to which we refer our readers), he quoted authorities in support of the right, and drew attention to the fact that by allowing the members of the Society to have access to its papers

during the course of a *re* attorney proceeding, the cause of justice would be furthered, as in many cases parties who had nothing to do with the transactions complained of, might nevertheless be in a position to furnish important evidence which would have the effect of influencing the opinion of the Benchers and assisting them in arriving at a proper and just finding. Mr. McPhillips followed and strongly supported the motion, advocating the abolition of all elements of secrecy in the proceedings of the Benchers. Mr. Nugent spoke in a similar strain in favour of the motion, and, as the seconder of the resolution lately passed by the Benchers, explained that such resolution was not in fact as he had intended. It was his desire that it should have withheld only sealed tenders from the members, whereas in the resolution the word "tenders" was used without any qualification. Mr. Aikins then left the chair in order to explain his position in regard to the stand taken by him, which had been commented on in this journal. His explanation was that he had not given such instructions to the assistant-secretary as the assistant-secretary informed certain members of the Law Society he had given. † He spoke at considerable length in opposition to the motion to have the proceedings open. Mr. Huggard

† It was the President's duty, at least, to have prevented the possibility of any such occurrence.

It is also to be regretted that there is a conflict between the President and the assistant-secretary as to the instructions given. It is not for us to decide such a delicate question. We may say, however, that the assistant-secretary was very explicit in his statement as to the extent of his instructions, and it is difficult to believe, that in the face of a formal demand, made for the express purpose of asserting a right with all the consequences which would naturally follow from a denial of that right, he would have exceeded his authority, or fallen into error. It is only just to the assistant-secretary, to say that there is no foundation for the opinion (which seems to have received some slight encouragement) that he acted either in a rude or officious manner. On the contrary, we take pleasure in stating, that the only impression conveyed by his demeanour was that he quite appreciated his delicate position in discharging a distasteful duty towards two members of the Law Society.—ED.

then addressed the meeting, and testified to the absolute accuracy of statement of facts before given in this journal. He pointed out the stand taken by Mr. Aikins in any event was untenable, as it was not for the members of the Law Society to show their right to inspect their own papers, as Mr. Aikins assumed, but, on the contrary, the *onus* lay on the governing body to show by what authority they retained such papers from the members. He further contended that it was degrading to think that the honour of the Law Society was not safe in the hands of its members, and maintained that it was as secure in the keeping of the humblest and most obscure practitioner at the Bar as it was in that of the President of the Law Society himself. He was followed by the Hon. Attorney-General, who, in a vigorous and forcible speech, supported the principles at issue and commented upon the fact of the injurious impression such a secret mode of procedure created in the mind of the public. He also characterized the witholding of the by-laws and papers in question from the members of the Law Society as "quite unjustifiable" and claimed that all proceedings should be open and accessible to the members of the Society. He further commented upon the fact that the impression had existed till quite recently among the Benchers that they were above and not open to criticism. As a Bencher *ex officio*, this was not his view and he was glad to see that it had been dispelled. He was warmly applauded on resuming his seat. Several other speakers followed on each side, Messrs. Kennedy, Cassidy, McCleneghan and Isaac Campbell against the motion. Mr. Haney closed the debate by condemning in strong terms the practice of concealment adopted in these matters and warmly advocating the principles at issue in the motion before the meeting. The question was then put by the acting-chairman, Mr. Tupper, and was lost by two votes, on a total number cast of twenty-eight.

The following Benchers voted for the motion: The Hon. Attorney-General and Mr. Nugent; against Messrs. Aikins, Kennedy, Campbell and Perdue.

We are not in the least discouraged by the result of our efforts to uphold the honour of the profession, and to remove what we believe to be a blemish on its reputation On the contrary, we are stimulated to fresh exertions, and when the matter comes up again, as it assuredly will on the first opportunity, before a full meeting of the Bar, we feel confident that the profession will still further vindicate its honour and dignity. Already we are authorized by one gentleman to state that he spoke and voted against the resolution under a misconception of the practice now adopted by the Benchers, and he has given us his assurance of support hereafter. This vote alone would have created a tie. Finally, we are of the opinion, though it is with great reluctance we refer to the subject, that those three gentlemen who opposed this motion, while doubtless honourable men, should have considered the delicacy of their position as persons against whom charges, however unfounded, have been formulated in the Society, and refrained from voting. Had they done so, the motion would have carried by a majority of three. We would remind the public that we have but one object in view in the strong and uncompromising stand we have taken in this matter. That object can best be expressed in the impressive words with which the Chief Justice of Manitoba closed his inaugural address the other evening: "Remember that the honour of the Bar of Manitoba is in your keeping. See that you hand it down to your successors without a stain."

CALL TO THE BAR.

The Chief Justice, in his lecture the other evening, commented upon the fact that the element of impressiveness was practically absent from this ceremony. That such is

the fact, in this Province, there can be no question, and we would like to see a change. We do not think that it is the fault of the gentlemen who are called to the Bar and presented by one of the Benchers to the Full Court in Term. They are invariably most respectful, as is becoming. On the contrary, we incline to the view that the cause is to be found in the indifference displayed by the judges towards the gentlemen who are being presented to them while going through the customary formalities. It would give us a great deal of pleasure to see more interest in the ceremony, and a graceful salutation, or a few well chosen and kindly words from the Bench,—such as we have heard fall from the lips of the late Chief Justice Wallbridge, on these occasions, who had a tender spot in his generous heart for the young gentlemen of his profession,—would long be gratefully remembered by a struggling and hard working junior. We have heard remarks from more than one junior which shewed that he felt hurt by his reception, and implied that he would have preferred to have been called without any formal presentation as it now exists, had it been possible. We do not mean to imply that there is any rudeness on the part of the Bench, but inattention there certainly is on these occasions. It was Lord Chancellor Bacon who said : "For the advocates and counsel that plead, patience and gravity of bearing is an essential part part of justice."

THE MANITOBA REPORTS.

Since our last issue we have received the first number of the new volume of these reports. We can now safely say that they are at last creditable to the profession. Mr. Davis, the new reporter, is to be congratulated upon the success of his efforts. This is another one of the reforms accomplished by the Junior Bar, in the face of what was once a chilling indifference on the part of the Benchers. In size

at least, they are no longer the school boy in knickerbockers, but have attained to the dignity of trousers.

FLOTSAM AND JETSAM.

THE LAWYERS' GLEE.

The following communication of Mr. J. J. Freeman, published in *Notes and Queries*, Dec. 27, 1890, will no doubt prove interesting:

A woman having a settlement
  Married a man with none;
The question was, he being dead,
  Was the Settlement gone?

Quoth Pratt, C. J., "The settlement
  Suspended doth remain
Living the husband, but, him dead,
  It doth return again.

Chorus of Puisne Judges,—

Living the husband, but, him dead,
  It doth return again.

This decision was afterwards reversed by Ryder, C. J., in a case reported as follows:

A woman having a settlement,
  Married a man with none,
He flies and leaves her destitute,
  What now is to be done?

Quoth Ryder, the Chief Justice,
  In spite of Sir John Pratt,
You may send her to the Parish,
  Wherein she was a brat.

Suspension of a Settlement
  Is not to be maintained;
That which she had by birth subsists,
  Until another's gained.

Chorus of Puisne Judges:

That which she had by birth subsists,
Until another's gained.

The writer is unable to give a citation where the above report may be found. We presume, however, that that above given will satisfy our readers demands.

UNDER THE OLD REGIME.

By the kindness of Sheriff Inkster, we furnish an exact copy of his father's commission as a Councillor of Assiniboia. The original is a parchment, 10 x 12 inches, with the H. B. Co.'s seal attached :

TO JOHN INKSTER, Esquire, hereby appointed a member of the Council of the District of Assiniboia:

BY VIRTUE of the Charter given to the Company of Adventurers of England trading into Hudson Bay by King Charles the Second by His Letters Patent under the Great Seal of England bearing date the second day of May in the twenty second year of His Reign, We do hereby appoint you, JOHN INKSTER, a Member of Council of the District of Assiniboia being part of the Territory of Rupert's Land. You are therefore in virtue of this commission to exercise all the power and to perform all the duties within that District which under the said Charter may be by Law exercised and performed by Members of Council.

GIVEN under the Common Seal of the said Governor and Company at their House in London this twenty third day of November One thousand eight hundred and fifty seven. } [SEAL.]

BY ORDER of the Governor
Deputy Governor and Committee.

(Sgd) WM. G. SMITH,
Secretary.

BARRISTERS BY PATENT.

We give an exact copy of one of the patents granted to practice law in this Province before the formation of the old Bar Association. The section under which the patent is granted is as follows :

"5. On special application, and under special circumstances, the Lieutenant-Governor-in-Council may admit to the practice of the law, any person found duly qualified by such persons as may be appointed to examine such applicant."

CANADA,

PROVINCE OF MANITOBA,

[SEAL.] VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c., &c., &c.

TO ALL TO WHOM THESE PRESENTS SHALL COME,

(Sgd.)
ALEX. MORRIS.

Greeting:

WHEREAS W—— B—— C——, Esquire, of the County of Selkirk, in the Province aforesaid, Student-at-Law, has made special application to the Administrator of our said Province in Council to be admitted an Attorney-at-Law and Barrister-at-Law of said Province, under the provisions of the Fifth Section of the Tenth Chapter of the Acts of 1871.

AND WHEREAS the said applicant has been examined by persons appointed for that purpose and found duly qualified.

AND WHEREAS thereupon on the day of the date hereof such applicant has been duly admitted by Our said Administrator-in-Council to the practice of the Law in the Province of Manitoba on such special application and under the special circumstances of his case and has been duly called to the Bar of Our said Province.

NOW THEREFORE KNOW YE, that we have admitted and authorized, and do hereby admit and authorize, W—— B—— C——, to practice the Law in the said Province of Manitoba as fully to all intents and purposes as provided by the Fifth Section of the said Act, with all the rights, privileges, fees, emoluments and advantages to such office, profession and position by Law appertaining, subject nevertheless to such regulations and judicial control as may by Law apply to Attornies and Barristers at Law.

IN TESTIMONY WHEREOF, We have caused these Our Letters to be made Patent and the Great Seal of

Manitoba to be hereunto affixed: Witness Our Trusty and Well Beloved the Honorable Alexander Morris, Member of Her Majesty's Privy Council for Canada and Administrator of Our Province of Manitoba, At Our Government House, at Fort Garry, this Sixth day of November, in the Year of Our Lord One thousand eight hundred and seventy-two and in the Thirty-Sixth Year of Our Reign.

(Sgd.)

BY COMMAND. J. ROYAL,
Provincial Secretary.

KENTUCKY LEGAL ODDITIES.

Is Kentucky one of the United States? Judged by her laws, we should say not, if a review in *The Nation*, of Dembitz' "Kentucky Jurisprudence"—a book which we have not seen—states the case accurately. It would seem from this that the laws of Kentucky differ widely in many respects from those of most of the other States. The reviewer says:

"It is impossible for us to undertake any detailed criticism of the peculiarities of the private law in Kentucky, but we may set down a few of the points that we have noted, without any attempt at classification. A check drawn against a bank deposit is an absolute appropriation of its amount, and cannot be withdrawn by the maker. The Kentucky statute of frauds does not require a written memorandum of a sale of goods. The words of the statute, 'No action shall be brought,' etc., do not apply to the defences to actions, and the term 'signed' does not require a subscription. Purchase-money mortgages are practically unknown, their effect being secured by the application of the principle of the vendor's lien. No preferences are allowed in assignments by debtors. A peculiar rule has been applied in the distribution of partnership and individual creditors. Relief is allowed for mistake of law. Promissory notes are not as a rule negotiable paper. The statute of charitable uses has been held to be law in Kentucky, although the *cy pres* doctrine is not recognized. Common carriers have not been allowed to contract themselves out of their common-law liabilities, and the principles of the Inter-State Commerce Act have been adopted by the Legislature. The liability of employers for injuries to their servants caused by the negligence of their fellows is greater than in most other States or in England before the recent statute. Suburban communities are not to be forced against their will to unite with cities. Women are allowed to vote on

school taxes, if they own taxable property or have children of school age. But the common-law rule still applies to married womens' property, with some statutory modifications. We have been struck with but one serious omission in this most comprehensive treatise—a clear statement of the law of perpetuities. Apparently land may be rendered inalienable for the whole term allowed by the old English rule, during any number of lives in being, and twenty-one years and ten months thereafter. This is far longer than is now practicable in England and in most of our States."

—*Albany Law Journal.*

Epitome of English Decisions.

ADMINISTRATRIX—Insolvent estate.—A married woman lent money to her husband, which went into his business. She was appointed administratrix to the estate of her husband, which was an insolvent one. Held, that she was entitled to retain the amount of her own debt from the moneys that came into her hands as administratrix and pay over the balance. *In Re May*, 45 Ch. D., 499.

ARBITRATORS—Two—Refusal to appoint a third.—An agreement was made to appoint three arbitrators, one by each of the parties, and the third by the two so appointed. One of the parties appointed an arbitrator, the other refused to do so. Held, that there was no power in law or equity by which the one party could be ordered to appoint an arbitrator. *Re Smith* v. *Nelson*, 25 Q. B. D., 545.

BILL OF SALE—Instalments—Payment.—A covenant read as follows: "The grantees shall pay the interest which shall have accrued at the rate aforesaid, upon the said principal sum; and in case default shall be made in payment of any of the said instalments of the principal sum, *the same* shall, until payment, continue to bear interest at the rate aforesaid." Held, that the words, "the same," referred to the principal sum, and not to the

instalments." *Haslewood* v. *Consolidated Credit Co.*, 25 Q. B. D., 555.

CONTRACT—Letters and correspondence.—When once it is shown that there is a complete contract arrived at, it is impossible that further negotiations between the parties can, without the consent of both, get rid of the contract already arrived at. Subsequent negotiations cannot be looked at, merely for the purpose of preventing that which would otherwise be a complete contract, from being so. *Bellamy* v. *Debenham*, 45 Ch. D., 481.

EXECUTOR—Creditor's action.—Motion to appoint a receiver to prevent trustees (also executors) from exercising right of retainer of mortgage debt. Held, that the assets should not be intercepted before they reached the hands of the executor, unless a case is shewn of the assets being wasted. *In Re Wells* ; *Malony* v. *Brooke*, 45 Ch. D., 569.

MARRIED WOMAN—Feme sole—Action against.—A statute provided (Mar. Woms. Prop. Act, 1882, sec. 1, s.s. 2) that a married woman, having separate estate, should be liable to be sued "in contract or in tort, or otherwise." Held, that under this statute, a married woman could be sued on any ground on which a *feme sole* could be sued. *Whittaker* v. *Kershaw*, 45 Ch. D., 320.

SALE OF LAND—Contract to purchase.—A purchaser at a trustee's sale bought in certain lots, subject to conditions which provided that purchases should be completed on or before January 24, 1890. On January 7, purchaser's solicitor wrote to repudiate the contract, on ground of want of title, and asked for a deposit. On January 29, the vendors' solicitor wrote, saying that they would procure certain conveyances that would make a good title. Held, that the purchaser was entitled to repudiate the contract. *Re Head's Trustees and Macdonald*, 45 Ch. D., p. 310.

VENDOR AND PURCHASER.—Goodwill.—Arthur Thynne sold, as a going concern, his business to defendant, with "the beneficial interest and good-will" of same, with, however, no express assignment of the right to use

plaintiff's name. Defendant used a number of trade cards and paper bags bearing plaintiff's name, and had more printed when same were exhausted. Held, that the defendant could not so use the plaintiff's name as to expose him to liability, though he had the right to use it to show that the business was the same as that formerly carried on by plaintiff. *Thynne* v. *Shove*, 45 Ch. D., 577.

OBITUARY.

In our last issue the date of the birth of the late Mr. Andrews was, by a printer's error, given as in the year 1866; it should have been 1856.

THE

WESTERN LAW TIMES.

VOL. I. FEBRUARY 15, 1891. No. 11.

Shall we introduce the Judicature Act?

It is pretty generally acknowledged by the legal profession, that some more simple method of procedure before the Courts in this Province, than the Common Law Procedure Acts should, as soon as possible, be introduced.

The effect of the English Acts in pleading was not to destroy the system in use prior to those Acts, or to change the essential principles, one of the chief features exhibited being the power of amendment.

Notwithstanding the well known conservatism of England, pervading the whole system of English institutions, the old Act of 1856, was superseded by what are known as the Judicature Acts of 1873 and 1875. This conservatism would hardly permit the English people to make a very radical change in the true sense, still the Judicature Acts were, for them, thought to be a wonderful move in the right direction.

It will naturally be admitted by all that the primary and chief object of all legislation relating to the administration of justice, is to find the cheapest, quickest and best means of bringing a case to trial, and final determination, "*interest reipublicae ut sit finis litium,*" and therefore we should in making a change, thoroughly investigate all

systems of procedure now in use throughout civilized communities.

A cursory glance at the provisions of the Judicature Acts of England will not be out of place.

These Acts, aiming mainly at the fusion of Judicature for the better distribution of the Judicial force, formed a single court called the High Court, divided into five departments, the Queen's Bench, Chancery, Common Pleas, Exchequer, Probate and Admiralty Divisions.

It is in those divisions that is vested the administration of the law, while the High Court of Justice, as such, can scarcely be said to have an existence.

It is, as one of the Judges described it soon after the passing of the Judicature Act, *a jus rationis*, that is, it exists only in theory or in contemplation of law.

The objects of these Acts are threefold.

First—To reduce the historical independent courts of Common Law and Equity to one Supreme Court of Judicature, consisting of two branches, a High Court of Justice, and a Court of Appeal.

Secondly—To establish for all divisions of the Court a uniform system of pleading and procedure.

Thirdly—To provide for the enforcement of the same rule of law in those cases, where Chancery and Common Law have hitherto recognised different rules.

The Acts do not fuse Equity and Common Law in the sense in which that phrase has generally been employed.

The Acts (consisting of eight) comprise 245 Sections, 72 Orders, over 1,050 Rules, and nearly 300 forms.

A recognised writer, Mr. Wilson, has issued no less than seven editions of his work upon the subject—the first appearing in 1875—a work far more voluminous than either Chitty or Lush's books on the old Common Law Procedure Acts.

This in itself demonstrates, to some extent at least, that the introduction of these enactments was only a radical change in the English sense, and not in the true acceptation of the term.

The current English Reports are now as much devoted to cases on practice as before, if not more so.

Mr. Wilson in his preface to the last edition referred to says that the additional practice cases in this edition over the preceding one, reach nearly 300 in number.

If we rid our reports of these particular cases what a boon it would be to the practitioner. The words of Professor Robertson are therefore very *apropos* upon the subject when he says that "the necessary literature of the law is increased by a dozen large volumes every year. The law becomes voluminous without becoming more elastic or more systematic."

"The stereotyped judicial habit is to follow absolutely the precedents set by every tribunal of higher rank and almost absolutely those set by tribunals of co-ordinate rank."

"The minute detail into which legal literature is thus made to descend is becoming an intolerable load, and it is a question whether some revolution in respect to precedents is not becoming necessary."

If then it is so apparent that some remedy should be applied to ease the burden of this ever increasing load of precedents upon legal subjects in the abstract, can there be two opinions on the necessity of excluding from our legal literature cases upon pure technicalities?

Ontario has followed pretty much the English Statutes and rules, not being sufficiently courageous to step aside out of the beaten track well worn by English decisions, or imagining that it was getting some wonderful improvement, and therefore did not look beyond the shores of Great Britain for a still greater improvement, or had not

sufficient originality to devise an Act to meet its own independent wants.

The principal Judicature Act is framed on the basis of a Report of a Commission which was appointed in 1867.

As Professor Muirhead, of Edinburgh, says "during the first three centuries of the Empire, Romans exercised more shrewdness and common sense when a plaintiff could state his demands in informal words, and if the defendant denied indebtedness, the Praetor straightway formulated a written appointment of, and instructions to, a Judge embodying the issue," and still earlier their precedure was less technical, for the "plaintiff laid his claim before a magistrate, who remitted the matter for trial to the centumviral court, or possibly in certain cases, to a single judge, and in the presence of witnesses, called by the parties declared exactly what was the question put in issue which the court or judge was to decide, and to go further, he (the judge) required sureties from the parties for the eventual payment by him who was successful."

Blackstone says that in the ancient courts the ecclesiastical and civil jurisdictions were blended together, the Bishop and the Sheriff originally sitting together, and the decision and proceedings therein *were simple and unembarrassed.*

Thus the ancient Roman and Saxon procedures show very clearly that instead of advancing, with other sciences, in simplification, legal procedure has steadily retrogressed, and has now reached such a high state of mystification and complication that the lay mind naturally possesses a traditional horror of anything savouring of Court procedure and litigation generally — choosing rather to relinquish the establishment of a right than to seek the "pure fountain of justice."

The Courts of the land are in theory established to enable individuals to redress wrongs suffered. In practice how

many whose rights are really invaded retire from the prosecution of an action or a cause feeling satisfied with the expeditiousness and simplicity of the machinery invoked?

Why should business principles and commercial enterprise be found lacking in this great science, so allied as it is to mercantile life, and one which might with others be of more use and advantage to mankind than it is?

Great praise is due to the little community in the Territories, scattered as it is over the vast area of our North-West, for its simple enactment known as the Civil Justice Ordinance of 1886.

Its provisions number four hundred and eighty-four, and so far as the Reports extant testify, the decided cases upon the Act are few, and in the opinion of those practising under its ægis, with whom we have had the pleasure of conversing on the subject, the Act gives great satisfaction, still of course admittedly open to simplification.

They have taught us a lesson which we might gladly follow and go further in the direction in which they have led us.

Our neighbors to the South are progressive not only in their commercial and mercantile life, but also in their Court procedure, and why should we, who are in advance of them in matters relating to land titles, be far behind them in others?

It is exceedingly strange that in no other department of human action, intellectual, moral, political, or industrial is the march of progress so slow as in the field of law, referring particularly now to our Court procedure.

We made most radical changes during the last session of the Local Legislature, and prior ones have brought about great improvement in our laws, yet our procedure is as musty and difficult to the practitioner as it was fifty years ago. A well-known text writer has very truthfully said

that "it is almost impossible, particularly in pleadings of a complicated nature, for any one but an accurate lawyer and experienced draftsman to avoid overlooking some points of a case absolutely essential to the maintenance of the right, or defence."

Admitting this, the question naturally presents itself—where is the remedy, if we do not adopt the Judicature Act of England or of Ontario?

From what we have said we fancy that although this Act may be, we do not concede it is, an improvement. Ought we to adopt it without looking thoroughly into the various systems of the States of the Union?

We understand that in some of the States a practitioner with a very large practice can carry on his business with one or two clerks, while the professional man here having an equal revenue is forced to employ a large staff of junior partners and clerks, which entails upon him, apart from salaries, a great outlay in office expenses, and in many instances his clerical labour is lost for some technical reason, and his work thrown away—at whose expense it matters not for the purpose of our argument. Such a fate is next to impossible with our American cousin with whom we have drawn a parallel.

It is satisfactory to note that at last, after nearly twenty years of our Provincial existence, we are really awakening to the fact that in respect of our Court procedure we are ages behind those who inhabit other parts of Western America; that the defects and shortcomings of our present system have become too intolerable to be endured longer, and that our natural progressiveness will not admit of much delay.

Our next Legislature should instruct the Government to make a careful examination into all the present systems of the American Republic, and submit a Bill to the Law Society, with a report on those systems, whose duty should

be to hold open meetings, for a proper discussion on the subject, and with the result of these meetings before them, the Government would be in a position to present a Bill to the following Legislature.

This would give ample time for a due and proper consideration of the question, and hasty action would thereby be avoided.

It should be a Government measure, and the Attorney-General should visit the principal States and find out from personal observation and interview the advantages and disadvantages of the various modes of procedure.

G. W. BAKER.

NOTES AND COMMENTS

THE BAR DINNER.

At an informal meeting held in this city on Tuesday last, the idea of holding an annual dinner of the Bar was heartily endorsed. Owing to the elections, however, it was decided that the inaugural dinner should not be held till they were over; that is, some date shortly after March 5. The legislature meets on the 26th inst., but will be adjourned till after polling day.

From the lengthy list of names of those gentlemen who had approved the idea, presented to the meeting, the profession will be glad to hear that the success of the dinner, so far, at least, as a large attendance is concerned, is already assured, and it was not deemed necessary to proceed further with the canvass for support. The following committee was struck: The Hon. Attorney-General, Messrs. Aikins, Q. C., Kennedy, Q. C., Haggart, Perdue, Howard, Baker, McPhillips and Archer Martin, (Hon. Sec.-Treas.)

It was resolved that the dinner should be strictly a Bar dinner, and that the committee should make all the necessary arrangements, and duly notify the members of the profession throughout the province, as soon as all the details are completed.

A MODE OF CITATION.

The new series of the Incorporated Law Society's reports, introduces a new style of citation. Henceforth the mode will be [1891] 1 Q.B., [1891] 2 Q.B., [1891] 1 Ch., (1891) 2 Ch., [1891] 3 Ch., [1891] P., [1891] A. C., [1891] 54 & 55 Vict. c. This is no longer than 24 Q. B. D. and

it has the merit of giving the approximate date of the decisions. There is a tendency now-a-days to give weight to the very oldest as well as the very latest decisions, hence the value of the new mode. However, there is one thing in Canada, we would like to see changed, and that is the method of citation of our Local and Dominion Statutes. The date in the English citation is bound to do away with the years of the Sovereign's reign. That alone will give Imperial Acts when cited in colonial courts a distinctive feature. But in Canada it must be, and is, trying to counsel to be asked by the court, when citing statutes in the usual way, to have to add "Manitoba" to the citation already large enough; that of 54 & 55 Vic., cap. –, sec. –, Man., or 54 & 55 Vic., cap. –, sec. –, (D). This mode of citation is unnatural and cumbersome, especially too when we have all the Provinces citing 54 & 55 Vic.'s, and also when the balance of the North-West Territories is parcelled out into Provinces, if we cite by the Sovereign's name, what a mixture of citation there will be! Surely at present the (Man.), or (D.), or (Ont.), should precede and not be affixed to the 54 & 55 Vic., for the sake of convenience at least.

We observe that in the N. W. T. the Ordinances are cited as Or. '84, No. 1. This is the natural method. We have the year at once and we have the Province. We have R. S. C., cap. —. This is very convenient, but how much better would not '1886,' or as it would be contracted, '86 C. cap. –, or '89 Man. cap. –, or '89 Man. No. —, be?

It might also be suggested that the age of the Province or Dominion might furnish the key to the volume. For instance; 23 Can., would be a very nice reminder that the Dominion was that old. 19 Man. would both mean the number of volumes of the statutes and the years of legislative action. Numerous examples might be cited from our

Southern neighbours relative to suitable methods of citation.

Above all we are glad to see that England has dropped entirely the useless "R" for reports from her method of citation. Ontario might drop the "R" in "Ont. R." without loss. What is it there for? Lawyers and laymen would understand just as well without as with it, that law reports were referred to. What else could they think it to be?

How soon are we to follow England in our Supreme Court and Provincial Reports and give the year?

STILL MORE Q.C.'S.

The last issue of the *Canada Gazette*, Feb. 14, contains the following notice:

His Excellency the Governor-General has been pleased to appoint the following gentlemen, all Barristers-at-Law, to be respectively Her Majesty's Counsel learned in the law, viz.:—

OTTAWA, 4th February, 1891.

FOR THE PROVINCE OF QUEBEC.

Frederick S. Lyman, of Montreal, Esquire.

FOR THE PROVINCE OF NEW BRUNSWICK.

The Honourable Andrew George Blair, of Fredericton.
The Honourable William Pugsley, of St. John.
The Honourable James Mitchell, of St. Stephen.
Charles Doherty, of St. John, Esquire.
George F. Gregory, of Fredericton, Esquire.
Silas Alward, of St. John, Esquire.
James Gordon Forbes, of St. John, Esquire.
Isaac Allen Jack, of St. John, Esquire.
Daniel Jordan, of Fredericton, Esquire.
Alfred A. Stockton, of St. John, Esquire.
Michael Adams, of Newcastle, Esquire.
James D. Phinney, of Richibucto, Esquire.
Allan Otty Earle, of St. John, Esquire.
James Alfred Vanwart, of Fredericton, Esquire.
Charles A. Palmer, of St. John, Esquire.
William W. Wells, of Dorchester, Esquire.

FOR THE PROVINCE OF NOVA SCOTIA.

Thomas W. Chesley, of Bridgetown, Esquire.

Seymour E. Gourley, of Truro, Esquire.
Charles R. Smith, of Amherst, Esquire.

FOR THE PROVINCE OF PRINCE EDWARD ISLAND.

The Honourable Neil McLeod, of Charlottetown.

We confess that we have grave misgivings as to the completeness of this list. We fear that if a proper and exhaustive search be made, there will yet be discovered —gathering clams by the sad sea waves, doubtless— at least two members of the Bar in the Maritime Provinces who have not had this "greatness thrust upon them." We invoke the sympathy of the public to their lonely state. Their situation is mournful in the extreme.

THE LAW JOURNAL REPORTS.

We see by a supplement to "*The Law Journal*" for Jan. 17, ult., that these most excellent reports are now entering upon their 70th year of existence. The proprietor announces this fact in a modest and unassuming notice, but he might have been excused a flourish of trumpets on this occasion, had he felt disposed to indulge in it. We do not know of any series of reports which has attained such a distinction in the history of legal reporting. *The Law Journal* and its invaluable reports are still in the van, and we hope they will long continue to be.

The Irish Law Times Reports have always commended themselves to our notice as models of careful and conscientious reporting, and the high encomiums which have been passed upon them by the Bench—some of which they reprint in a late issue—are nothing more than they justly merit. We gather from an editorial that the members of the legal profession in Ireland do not give *The Irish Law Times Reports* that amount of support which the editor is certainly justified in expecting. We hope that this state of affairs will be speedily altered.

THE CAPE LAW JOURNAL.

This is one of our exchanges that we receive with special pleasure. We must congratulate the publisher on the handsome appearance presented by the last issue. The wide margins and good and well printed paper, are an improvement on the former numbers. The size adopted, we are glad to see, is the same as this journal. We may be pardoned in taking this as a compliment, but we do think that this is the most convenient size for law journals, other than weeklies. The present number of our far off contemporary is an excellent one, the articles are most interesting, one in particular, "Mhlakwapalwa at a Circuit Court," we will notice more fully hereafter. If we might be allowed to make one suggestion only, it would be that the legal cards in the advertising supplement would be none the worse for a little editorial revision, there being too much display to be in keeping with the high-class character of the journal, particularly as it is "under the superintendence and control of the Incorporated Law Society of the Cape of Good Hope."

BANK OF MONTREAL v. POYNER.

The attention of the learned judge apparently does not seem to have been called to the fact that the head note of *Wright* v. *Arnold*, 6 Man., R. 1, is wider than the judgment. The term used in the judgments is "division," not "district." As is well known in each judicial district there are several divisions under the same judge. Sec. 48, above cited, refers to "divisions" only and not to "districts," and it has been held by two county court judges, that while they can authorize the trial to be had in one division rather than another, within the particular district over which they preside, the section does not authorize a transfer from one judicial district to another. The term judicial division is defined by the County Court Act, sec. 2;

and also see the use of "division" and "judicial divisions" in secs. 5 and 6. As to the term "district," see sec. 7, where the two terms are used in contra distinction to each other. Any doubt of this nature should be removed by legislation.

STUDENTS LECTURES.

The following lectures have already been delivered to the law students:

The Hon. the Chief Justice, Inaugural Address, Jan. 9 ult.; Mr. A. E. McPhillips, "Common Law Practice," Jan. 13 and 16 ult.; Mr. N. F. Hagel, Q.C., "Criminal Law," Jan. 20 and 23 ult.; Mr. R. Cassidy, "Criminal Practice," Jan. 27 and 30 ult.; Hon. Mr. Justice Killam, "Equity Jurisprudence," Feb. 3 and 6 inst.; Mr. L. W. Coutlée, "The Torrens System," Feb. 13 and 17 inst.

In regard to the lecture of Mr. Justice Killam, we have to thank the learned judge for the opportunity he has afforded us of perusing carefully at our leisure, the notes of this valuable and instructive paper. We were particularly struck with his comments on, and elucidation of, the true principle of the application of the various maxims of equitable jurisdiction, as administered by the courts in this Province. We regret that we have not space to make lengthy extracts from the notes of the learned judge, but we cannot pass over his remarks on "tacking, which our Registry Act in terms abolishes":

"In some text books, the doctrine of tacking is used much more widely. Thus, it is an ordinary principle of equity that in addition to the mortgage debt and interest, the debtor seeking to redeem, should pay all costs incurred by the mortgagee in maintaining the title to the estate, and in some other respects; also that the debtor must pay all further advances by way of charge on the mortgaged property in order to redeem. In some cases, a debt due the mortgagee, not charged on the land could be tacked to the mortgage debt, as against the heir or devisee of the mortgagor. And a mortgagee having the legal estate could tack a judgment recovered or purchased by him. Now you must not be misled by the general provision of the Registry Act abolishing tacking, into the idea that there cannot now be any such tacking. The limits of that

enactment have not been determined, but its object must be considered. And probably it would be held that it does not prevent any such tacking, as against the mortgagor himself or his heir or devisee, and that even as against registered transferees or mortgagees of the equity of redemption, many of the costs referred to can be tacked to the mortgage debt.

Both tacking and another doctrine of equity known as the consolidation of mortgages, are dependent upon and serve to illustrate the maxim, "He who seeks equity must do equity." You will observe that the mortgagee having the legal estate can only be interfered with by the active interposition of a court of equity, which acts upon the view that the mortgagee cannot in conscience hold the estate if his debt is paid. But it would not be unconscientious in the view of a court of equity, for him to insist upon payment of these other charges before reconveying, and he will not be made to reconvey to the mortgagor without their being paid, and that court then imposes as a condition of its interference that the mortgagor shall do equity by paying these additional amounts.

Then, suppose that several distinct estates have been mortgaged by one mortgagor to the same mortgagee for distinct debts, equity would not compel the mortgagee to suffer redemption of any estate except upon terms of payment of all the mortgage debts. How far this could now be insisted upon against transferees of the different estates still remains to be determined."

COURT SITTINGS.

The following dates have been fixed for the various sittings of the courts :

ASSIZES.

Eastern Judicial District, holden at Winnipeg—Tuesday, March 10 ; Hon. Mr. Justice Killam.

Central Judicial District, holden at Portage la Prairie—Tuesday March 17 ; Hon. Mr. Justice Bain.

Western Judicial District, holden at Brandon—Tuesday, March 10 ; the Hon. the Chief Justice.

EQUITY.

Holden at Winnipeg—April 7 next.

TERM.

Easter Term begins on May 4, and ends May 16, following.

FLOTSAM AND JETSAM.

MISSING HEIRS.

Mr. Sidney H. Preston contributes the following interesting notes to *The Law Journal* for Jan., 3 ult.:—

During the very eventful year now closing numberless advertisements have been issued by solicitors and others inquiring for missing relatives, legatees, and next-of-kin to claim 'windfalls more or less considerable. In some cases these notices are singularly successful as a means of conveying good news, while in others the persons sought are dead, absent beyond seas, or from other causes fail to respond. As this is pre-eminently the season when most families are thinking of relatives long lost sight of, it seems a convenient moment for summarising the more remarkable of these kindred notices, the subject being of universal interest, and likely to become each year more important as populations increase and our colonies extend.

To begin with "Crown Windfalls." Some forty persons died intestate or illegitimate without known heirs, consequently their estates fell to the Crown, and the Treasury solicitor, as the nominee of Her Majesty, advertised for the next-of-kin. The amount of each estate is not stated but some of these Windfalls, in past years, have been of immense value, 200,000*l.* being about the maximum.

Henry H., or his representatives, are entitled to share in the proceeds of the sale of a castle and other estate in Radnor; and some property has recently been discovered to which the representatives of E. S., of Wakefield, who died in 1857, may be entitled. The address is wanted of a person who obtained his living by conjuring in public houses; and R. P. B., who went to Australia, and had the misfortune to break his leg, is wanted to claim 2,000*l.* The son of a grocer, last heard of in 1873 travelling with a menagerie, is inquired for; and E. J., of Londonderry, is entitled to 1,000*l.* The descendants of Pierre J., who married in 1742, are sought; 2,500*l.* has become divisible among the nephews and nieces of an innkeeper, who died in 1851; and the sons of a farm baliff, who left England several years ago, are interested in an estate. W. G., of the Grenadier Guards, who may have died in a hospital, is wanted; also the relatives of a lady, formerly an inmate of the Fulham Union; while the German Consul inquires for H. M. C., of whom it is not known whether he is alive or dead. The papers relating to money and shares of T. J. R., who was burnt to death, are missing; the daughter of a postmaster has

died possessed of freehold property to which her missing heirs are entitled; and 3,397*l.* awaits the unknown heirs of John Renny.

The next-of-kin of a governess who died at sea, and of a ship's captain who died at Tahiti, are sought; also information as to the relatives of an Indian princess. Mary T., believed to have died in 1863, or her children, are entitled to a legacy of 3,000*l.*; and a traveller in jewellery, who left for Canada in 1866, is wanted to participate in his father's estate; while R. W., Robert and Eliza Yates, or their representatives, are only now inquired for as legatees of P. W., who died in 1816. Mr. Payne, M. P., last seen in 1888, is supposed to have been drowned, and letters of administration have been granted to his estate accordingly. Many similar applications were made, pursuant to the Presumption of Life Limitation (Scotland) Act, under which relatives of Scotchmen 'supposed to be dead' sought to 'uplift and enjoy' their estates. All inquiries as to the next-of-kin of a royal lecturer, who died at Munich, have proved futile; and the children of a captain who went to New Zealand thirty-eight years ago are missing.

Information was sought as to the kindred of a young gentlemen who left his home in the eighteenth century, and became a tutor under an assumed name, owing to a breach with his parents; and it would be to the advantage of J.A., the son of a spirit merchant, of Glasgow, to communicate with his father's executors. Mr. de la R., of London, has died abroad leaving property, but his heirs are unknown; and the relations of S. B., who was killed in action on board H. M. S. Monmouth, are interested in an estate in Chancery. A gardener, late of Rosherville Gardens, is entitled to residnary estate; and H. S. C., who left for Anstralia in 1843, is also entitled to property. The relations of J. C., who died in 1844, are only now sought; also of a Scotch drover, who died in Queensland. Lady S. is wanted to participate in an unclaimed estate left by a lady who died at sea; and representatives of proprietors of shares in the West New Jersey Society some two hundred years ago are entitled to unclaimed dividends. B. E., who left Leeds for America in 1840, is sought; also G. D. S., who went to South Africa in 1880, and George E., who left Wakefield in 1830.

The heirs of a widow of a general; the children of an organ builder, and of a bootmaker who left his home in 1862 and not since heard of, are wanted. The sons of a Scotch supervisor of excise, can receive a share of their father's means falling to them; and the nephews and nieces of a house steward are interested in the residue of an estate. John M., last heard of in Buenos Ayres, is entitled to property; Jane J., who emigrated many years ago, is interested in the estate of her cousin; and John K., who left for America in 1863, and not since heard of, is requested to make himself known, or he will be declared to be deceased, intestate.

Among many persons inquired for by the Court of Chancery may be mentioned J. G., who left for America in 1851, interested in a sum of

4,100*l.*; G. S. employed at a livery stable in 1841; a person who went to America, and enlisted under a feigned name, and believed to have been killed in battle; the children of a porter, formerly of the University Hospital; J. M., who left for Australia in 1855; and Elizabeth G., who left for Paris in 1862.

The next-of-kin of the following, among many others, were sought: The daughter of a lady who died in Charing Cross Hospital; H. R., whose sons and daughters were last heard of at San Francisco, the Black Forest, and elsewhere; William Ritchie, who died at Tennessee; Martha B., of London, who died in 1848; T. F., of Liverpool, who died in 1843; a domestic servant; the wife of a surgeon, deceased in 1837; a professor of the harp; and a wine merchant who died in 1823.

Numerous persons were wanted for 'something to their advantage.' These included the relations of a boy who left London with a party of Mormons; Sir Edward C., who was alive thirty-five years ago; John C., formerly of Liverpool, afterwards of Buenos Ayres; the widow of W. R., of Manchester, drowned at sea; an excavator; the son of a clergyman; a cabdriver; and the widow and son of a waiter; while the son of a riding-master in the Life Guards, and Patrick E., of Antrim, in 1856 were wanted for something 'greatly' to their benefit.

In addition to the foregoing examples of family vicissitudes, it may be noted that the Cape Government published a long list of intestates, whose 'unknown heirs' are entitled to about 35,000*l.*; the War Office issued lists of soldiers' unclaimed balances; and the New Zealand Government issued lists of intestates. The Bank of England issued notices respecting unclaimed stock or dividends, and numerous rewards were offered far missing birth, marriage and burial certificates, not to mention lost wills, supposed bank deposits, &c.

Many other cases deserve a passing notice, but I fear I have already trespassed largely upon your valuable space. The interesting nature of the subject must be my apology.

A 13TH CENTURY "BOYCOTTER."

Those who feel disposed to saddle the origin of the iniquitous system of "boycotting" on the Irish race, will see by the under given paragraph taken from the *Solicitors Journal*, Dec. 27 last, that the Irish may reasonably be assumed to have derived it, in common with other vices, from their Anglo-Norman conquerors:

Verily, there is nothing new under the sun. The last volume of the Selden Society's publications just issued (Select Civil Pleas from 1200 to 1203), contains, among other interesting matter, a case of boycotting in A.D. 1200. MATILDA, the wife of ROGER LE PASSUR, complained that

JOHN DE MEWIC had "deforced her of her land in Fransham, which she recovered against him by judgment of the courts; *so that no one dare till that land because of him*, nor could she deal with it in any way because of him." Both the act and the motive bear a close resemblance to recent practices in Ireland; the land had been recovered against the defendant by a judgment of the court, and it was kept untilled because no one dare venture to till it in consequence of the anticipation of a summary penalty to be inflicted for so doing—the "ultimate sanction" in fact, without which boycotting, whether in the thirteenth or the nineteenth century is unavailing. In the case before the court in A.D. 1200 it is recorded that "because the sheriff testified that he believed what she [MATILDA LE PASSUR] said to be true, it is considered that JOHN do defend himself with the twelfth free hand, in five weeks after Michaelmas. Pledge of the law, ROGER DE BINTREE."

TERM BRIEFS.

HILARY TERM.

The following gentlemen were admitted to the bar :

William Gregor Bain, Winnipeg.
James Graham Harvey, Winnipeg.
Arthur Wellesley Clark, Winnipeg.

The following gentlemen were admitted as attorneys :

James Graham Harvey, Winnipeg.
Arthur Wellesley Clark, Winnipeg.
John Henry Black, Morden.
Frank Alexander Brown, Carman.
William Gregor Bain, Winnipeg.
John Alexander Machray, Winnipeg.

Epitome of English Decisions.

AGREEMENT—Sale and hiring.—Where a party buys goods at a fixed value and signs a hiring and purchase agreement to pay so much a month until the price was paid with the privilege of a fixed sum per month, it was, in this case, held under the circumstances, to be a sale subject to a right of purchase on terms which would have been imposed in the case of a mortgage. *Beckett* v. *Tower Assets Co.* '91, 1 Q. B., 1.

CONTRACT—Apprenticeship.—A contract of apprenticeship is not invalid because the master is a corporation. *Burnley Eq. C. Co.* v. *Casson*, '91, 1 Q. B, 75.

CRIMINAL LAW.—Incomplete bills of exchange with drawers name blank, are "securities for money." *Queen* v. *Bowerman*, '91, 1 Q. B., 112.

LIBEL—Corporation.—An action for libel will not lie against one who charges a corporation with corrupt practices by the corporation, especially when the statement of claim contains no allegation that the plaintiffs suffered special damage thereby.—*Mayor, etc., of Manchester* v. *Williams*, '91, 1 Q. B., 94.

MORTGAGE—Equity.—For a trust or equity to affect the conscience of a person who gets in the legal estate, it must be a trust or equity in favor of the person against whom the legal estate is set up, not in favour of a third party. *Taylor* v. *Russell*, '91, 1 C. D., 8.

POWER OF ATTORNEY—Foreign.—Where a Brazilian subject executed in Brazil, in the Portuguese language, a power of attorney to a broker resident in London, to buy and sell shares, and the broker did so, on an issue to detemine whether the construction of the power was to be governed by Brazilian or by English law, it was held that the intention of the grantee was to be ascertained by the evidence of translators, experts, and, if necessary, Brazilian lawyers, and that if such evidence shewed that the intention appeared to be that the authority should be acted on in England, the extent of the authority as far as English transactions were concerned, was to be determined by English law. *Chatenay* v. *Sub-Marine Tel. Co.*, '91, 1 Q. B., 79.

PRACTICE—Statute of limitations.—A writ of summons will not be renewed after the expiration of twelve months from its date, where the plaintiff's claim would be barred by the statute, save apparently under under exceptional circumstances. *Hewett* v. *Barr*, '91, 1 Q. B., 98.

PRACTICE—Writ of Summons.—Where a writ was issued in the ordinary form for service without the jurisdiction against a person who shortly before the issue of the writ left England, and has since remained outside the jurisdiction, although it appeared that he did not go to

avoid service, an order for substitutional service cannot be made. *Wilding* v. *Bean*, '91, 1 Q. B., 100.

TRESPASS—Action.—Where a defendant out shooting, fired at a pheasant and one of the pellets glanced off the bough of a tree and accidently wounded the plaintiff, who was engaged in carrying cartridges and game for the party, it was held that the defendant was not liable for negligence in an action for damages by the party so injured. *Stanley* v. *Powell*, '91, 1 Q. B., 86.

BOOK REVIEWS.

Slavery in Canada. By J. C. Hamilton, Esq., Barrister-at-law. Paper. Extract from Transactions of the Canadian Institute, 1890. Privately printed.

We have read with a great deal of interest Mr. Hamilton's instructive little pamphlet on the above subject. Strangely enough we were considering this subject some few days ago, and wondering to what extent slavery had prevailed in Canada, and how it had been abolished in the various provinces. The author answers both these questions to our entire satisfaction. He shows that slavery in law, but not in fact, existed in Lower Canada till the Imperial Act of 1833. In Upper Canada the system was abolished by the same statute. The slaves were not merely negroes but Indians also, these latter being, apparently, chiefly Panis, *i. e.* Pawnees. The system in Nova Scotia "was never there abolished by Parliament, but was unsuited to the climate and fell into desuetude. The like was the case in other Maritime Provinces."

Two quaint little cuts are given. The first of a Pawnee "used in connection with a French advertisement for a

runaway apprentice; the other from a like notice in English."

Common Law Practice: A lecture delivered by A. E. McPhillips, Barrister-at-law, on the 13th and 16th days of January, 1891, to the Law Society of Manitoba, Winnipeg, with the approval of the Benchers. Paper. Privately printed.

We have to thank Mr. McPhillips for a copy of his valuable and instructive lecture delivered to the law students. We have already referred, on p. 210, to the ability and painstaking care displayed by the lecturer in his address, and have nothing to add to the remarks then made, except that a careful perusal of the lecture fully justifies our former expressions. It is of an eminently practical nature, and will well reward the attention of any practitioner.

4475

THE WESTERN LAW TIMES.

EDITORS:

ARCHER MARTIN AND J. T. HUGGARD,
BARRISTERS-AT-LAW.

VOL. I.

NOTES OF RECENT DECISIONS.

WINNIPEG, CANADA.
THE STOVEL COMPANY, PRINTERS.
1890–1.

JUDGES

OF

THE COURT OF QUEEN'S BENCH

FOR

MANITOBA.

DURING THE PERIOD OF THESE REPORTS:

THE HON. THOMAS WARDLAW TAYLOR, *Chief Justice.*

" " JOSEPH DUBUC,
" " ALBERT CLEMENTS KILLAM, } *Puisne Judges.*
" " JOHN FARQUHAR BAIN,

Attorney-General:

THE HON. JOSEPH MARTIN.

Attorney-General of Canada and Minister of Justice:

THE HON. SIR JOHN S. D. THOMPSON. KNT.

CORRIGENDA.

P. 15, l. 15; for "53" read "55."
" 18, l. 16; for "Starch" read "Stave."
" 37, l. 17; for "caveator" read "caveatee."
" 138, l. 17; for "92 B. D" read "9 Q. B. D."
" 143, l. 9 from foot; for "exemption" read "execution."
" 144, l. 17; for "1890" read "1889."

TABLE OF CASES.

A

Aikins, McCann v., 94.
Allan, *Re*, 132.
Archibald v. Hubley, 223.
Archibald v. Munic. Youville, 140.
Armitage v. Imp. Bank, 38.
Ashbaugh, *Re*, 13, 108, 252.
Ashdown v. Lynch, 211.
Ashdown v. *Free Press*, 102.
Attorney, *Re*, 13, 108, 252.
Atty.-Gen. of Canada v. McDonald, 9.

B

Bank of Montreal v. Poyner. 205.
Bannatyne, Selkirk East, v. 169.
Bannerman v. Emerson, 44, 98.
Barber v. Proudfoot, 144.
Barrett v. Winnipeg, City of, 151, 157, 195.
Beall v. Confederation Life, 245.
Bellamy, Waters v., 14.
Bernard v. Tetu, 142.
Bertrand v. Parkes, 85.
Bertrand, Regina v., 220.
Bibby, *Re*, 32.
Bonneau, Wishart v., 61.
Brady v. Regina, 219.
Braun, Ward v., 189.
Brit. Can. Loan Co., Ripstein v., 79.
Brock, Fisher v., 173.
Brown v. MacLise, 35.
Brown v. Shantz, 40, 153.
Brown v. Wood, 18.
Bryson, Freehold L. & S. Co. v., 211.
Burrows, Howard v., 115, 177.

C

Campbell, Downs v., 146.
Can. Anthac. Co., Creagh v., 155.
Can. Pac. Ry. Co., *Re* The, 196.
Can. Pac. Ry. Co. v. Cornwallis, Munic. of, 48, 134.
Can. Pac. Ry. Co., McDonald v., 246.
Can. Pac. Ry. Co., McGuinney v., 83.
Can. Pac. Ry. Co. v. National Park, 45.
Carr v. Wade, 88.
Case v. Stephens, 92.
Charlebois, McDonald v., 149, 172.
Chevrier, Gowan v., 80.
Chevrier v. Parmenter, 167.
Claxton, *Re*, 122.
Cleaver, Sinclair v., 27.

Confederation Life, Beall v., 245.
Coombs, Thibaudeau v., 251.
Cornwallis, Munic. of, Can. Pac. Ry. v., 48, 134.
Cossette v. Dun, 225.
Couture v. H. B Co., 1.
Creagh v. Can. Anthrac. Co. 155.

D

Dickson v. Mutual Reserve, 172.
District Registrar, Mulligan v., 120.
Dougall v. Leggo, 203, 246.
Douglass, *Re*, 114.
Downs v. Campbell, 146.
Drummond, Dysart v., 101, 160.
Dun, Cossette v., 225.
Dysart v. Drummond, 101, 160.

E

East Selkirk v. Bannatyne, 169.
Eden v. Eden, 116, 208.
Electors Act, *Re* Lists of, 2.
Emerson, Bannerman v., 44, 98.
Emerson v. Sparrow, 64.
Empire Brewing Co. v. Harley, 124, 241.
Empire Brewing Co., Todd v., 39.

F

Fisher v. Brock, 173.
Flummerfelt, Mahon v., 127.
Fonseca v. Schultz, 50, 236.
Forest v. Gibson, 40, 82.
Freehold L. & S. Co. v. Bryson, 211.
Free Press, Martin v., 240.
Free Press, Ashdown v., 102.

G

Galbraith, Merchants Bk. v. 123, 217.
Galt v. McLean, 15.
Gibb, Portage Mill. Co. v., 43.
Gibson, Forest v., 82.
Gibson, Massey v., 164.
Gillespie v. Lloyd, 243.
Good, Merchants Bank v., 95.
Gowan v. Chevrier, 80.
Graham, Sprague v., 214.
Grant v. Hunter, 36, 112, 129, 183, 216.
Grant, Peoples Loan Co. v. 230.
Green, Shore v., 7.
Grundy, Ritchie v., 233.

H

Haffield v. Nugent, 57.
Halter, Molson's Bank v., 229.
Hamilton, Alexander, *Re*, 239.
Hanbury v. Hughes, 29, 69.
Harley, Empire Brewing Co. v., 124.
Hebb v. Lawrence, 163.
Hobbs v. Ont. Loan & D. Co., 226.

Hockin v. Whellams, 59.
Howard, Regina v., 140.
Howard v. Burrows, 115, 177.
Howe v. Martin, 89, 117.
Hud. Bay Co., Couture v., 1.
Hubley, Archibald v., 223.
Hughes, Hanbury v., 29, 69.
Hunter, Grant v., 36, 112, 129, 183, 216.
Hutchinson v. Mair, 65.

I

Imperial Bank v. Armitage, 38.

J

Jackson, Power Manfg. Co. v., 12.
Jewell, Regina v., 52.
Jones, Waterous v., 133.
Joyal, Leveque v., 250.

K

Keefe, Regina v., 122.
Kildonan, *Re*, 100.

L

Lachance, Mulvihill v., 171.
Lafferty v. Spain, 148.
Lamarche, Shaw v., 81.
Laird v. Trerice, 204.
Lake Wpg. Trans. Co., *Re* The, 193.
Lawrence, Hebb v., 163.
Lawrence, Regina v., 155.
Leggo, Dougall v., 203, 346.
Leggo v. Thibaudeau, 151.
Leveque v. Joyal, 250.
Lists of Electors Act, *Re*, 2.
Lloyd, Gillespie v., 243.
Lon. & Can. Invest. Co. v. Munic. Morris, 175, 215.
Lougheed v. Praed, 67, 98.
Louise, Munic. of, White v. 186.
Louise, Munic. of, Williams v., 55.
Lynch, Ashdown v., 211.

M

Mahon v. Flummerfelt, 127.
Mair, Hutchinson v., 65.
Man. Mort. Co. v. Rosenblood, 35.
Mann, Winnipeg & H. B. Ry. Co. v., 24, 129, 253.
Martin v. *Free Press*, 240.
Martin, Howe v., 89, 117.
Martin, Moore v., 97, 228.
Martin, Rowand v., 28, 139, 140.
Massey v. Gibson, 164.
Mathers, *Re*, 235.
Merchants Bk. v. Galbraith, 123, 217.
Merchants Bank v. Good, 95.
Merchants Bank v. McMicken, 93.
Merchants Bank v. Mulvey, 5, 50.
Miller v. Man. Lum. Co., 74.
Miller v. McCuaig, 10, 110.
Molson's Bank v. Halter, 229.
Moore v. Martin, 97, 228.

Morden v. South Dufferin Munic., 69.
Morris, Munic. of, Lon. and Can. In. Co. v., 175, 215.
Mulligan v. District Regis., 120.
Mulvihill v. Lachance, 171.
Mutual Reserve, Dickson v., 172.
Mulvey, Merchants Bank v., 5, 50.

Mc

McArthur, Stephens v., 17, 72.
McCann v. Aikins, 94.
McCartney, *Re* J. B., 249.
McCuaig, Miller v., 10, 110.
McCuaig, Whitla v., 248.
McDonald, Atty-General of Can. v., 9.
McDonald v. Charlebois, 149, 172.
McDonald v. Can. Pac. Ry. Co., 240.
McGuinney v. Can. Pac. Ry. Co., 83.
McKay v. Nanton, 201.
McClary Manfg. Co. v. Winkler, 170, 175.
McLatchie v. McLeod, 53.
McLean, Galt v., 15.
McLeod v. Pearson, 12.
McLise, Brown v., 35.
McMicken, Merchants Bank v., 93.
McMicken v. Ontario Bank, 41, 96, 249.
McMicken, Ontario Bank v., 161.

N

Nanton, McKay v., 201.
National Park, Can. Pac. Ry. v., 45.
Nichol v. Ryan, 126.
Nicholson and Ry. Commr., *Re*, 4.
North Dufferin, Starkey v., 106.
Nugent, Haffield v., 57.

O

Ontario Bank, McMicken v. 41, 96, 249.
Ontario Bank v. McMicken, 161.
Ontario Bank v. Smith, 118.
Ont. Loan & Deb. Co., Hobbs v., 226.

P

Parkes, Bertrand v., 85.
Parmenter, Chevrier v., 167.
Pearson, McLeod v., 12.
Peoples Loan Co. v. Grant, 230.
Peterson, Regina v., 2.
Portage Milling Co. v. Gibb,
Power Manufg. Co. v. Jackson, 12.
Poyner, Bank of Montreal v., 205.
Praed, Lougheed v., 12.
Proudfoot, Barber v., 144.

R

Railway Commr., *Re* Nicholson and the, 4, 231.
Regina v. Bertrand, 220.
" v. Brady, 219.
" v. Homard, 140.
" v. Jewell, 52.
" v. Keefe, 121.
" v. Lawrence, 155.
" v. Peterson, 2.
" v. Quebec, City of, v. 221.
Regina v. Starkey, 61, 62, 88, 137, 207.
Regina v. Thomas, 222.
" v. Willis, 46, 104.
Ripstein v. Br. Can. Loan Co., 79.
Robertson v. City of Winnipeg, 33.
Rosenblood, Man. Mor. & In. Co. v., 35.
Rowand v. Martin, 28, 139, 140.
Ryan, Nichol v., 126.
Ryan v. Whelan, 30, 104.
Russell, Waterous v., 21.

S

Saskatchewan Coal Co., *Re*, 114.
Schultz, Fonseca v., 50, 236.
Shantz, Brown v., 40, 153.
Shaw, In *re*, 233.
Shaw v. Lamarche, 81.
Shore, *Re*, 6.
Shore v. Green, 7.
Sinclair v. Cleaver, 27.
Smith, Ontario Bank v., 118.
Snow, Wes. Can. v., 107.
South Dufferin, Munic. of, Morden v., 69.
Spain, Lafferty v., 148.
Sparrow, Emerson v., 64.
Sprague v. Graham, 214.
Stark and Stephenson, *Re*, 191.
Starkey v. North Dufferin, 106.
Stephens v. McArthur, 17, 72.
Stephens, Case v., 92.
Stobart v. Shorey, 127.

T

Tait, *Re*, 76, 97, 158.
Tetu, Bernard v., 142.
Thibaudeau, *Re*, 147.
Thibaudeau v. Coombs, 251.
Thibaudeau, Leggo v., 151.
Thomas, Regina v., 222.
Todd v. Emp. Brewing Co., 39.
Todd v. Union Bank, 90.
Trerice, Laird v., 204.

U

Union Bank, Todd v., 90.

W

Wade, Carr v., 88.
Ward v. Braun, 189.
Waterous v. Jones, 133.
" v. Russell, 21.
Waters v. Bellamy, 14.

Western Can. Loan Co. v. Snow, 107.
Whelan, Ryan v., 30, 104.
Whellams, Hockin v., 169.
White v. Munic. Louise, 186.
Whitla v. McCuaig, 248.
Williams v. Munic. Louise, 55.
Willis, Regina v., 46, 104.
Winkler, McClary Mfg. Co. v., 170, 175.
Winnipeg, City of, Barrett v., 151, 157, 195.
Winnipeg, City of, Robertson v., 33.
Winnipeg Water W. Co. v. City of Winnipeg, 99, 171.
Winnipeg & H. B. Ry. v. Mann, 24, 129, 253.
Winnipeg Water W. Co. v. Wpg. St. Ry. Co., 109.
Wishart v. Bonneau, 61.
Wood, Brown v., 18.

Y

Youville, Munic. of, Archibald v., 140.

CASE INDEX.

A

Abandonment—Of plea 7
Of excess in County Court—Prohibition 203, 246
Abortive Sale..... 151
Accepted Order—Novation.... 181
Accord and satisfaction 82
Account—"Settled" or "stated" 203
Action—Right of—Novation.. 181
Added Territory—R. P. Act—Mortmain—Licence..... 196
Agency—Sale—Estoppel....29, 69
Allotment—Of half-breed lands—Taxation after 235
Amendment—Of petition under R. P. Act..... 88
Adding defendant—Misjoinder..... 95
Of interpleader issue 173
Appeal-When certiorari pending 88
From judges order—Verification of order appealed from 110
From county court—Certificate of judge 109
From county court—Bond for same 12
From county court—Irregularities 171
From order of referee—Rule 101..... 148
From conviction—Under N. W. T. Ordinances—Jurisdiction 155
From judges finding of fact 162, 225, 228
To Supreme court from order for final judgment..... 215
Arbitrator—Biased—Award.. ....139, 160
Expropriation—Prospective injury—Erroneous finding and principles 231
Removal of..... 4
Assessment — See Municipal Law—Taxes.
Assignment — Of preferential judgment..... 127
For benefit of creditors....17, 72
Of tax certificate 132
Priority of—Registration.... 191
By trustee to co-trustee 229
Attorney—Indictable offence—Striking off rolls—Rule to compel answer to criminal charge.....13, 108, 232
Bill and capacities 115, 177
Masters report on 252
Award—See Arbitrator.

B

Banking Act—Right to bring action 5
Bankruptcy and insolvency—See Chattel Mortgage.
Books—Production of company's on examination 233
Bond—On appeal to county court..... 12
On election petition — insufficiency of 250
Bill of Sale—See Chattel Mortgage.
Bills and Notes—3 & 4 Anne, c. 9—Action of endorsee prior to 1884 .....5, 50

By-law—Quashing—Local option—Uncertainty..... 55
Quashing—Discretion..151, ... 157, 195
Defective notice of—Estoppel—Diverting highway 186
Against keeping gaming house—*Ultra vires* 233

C

Capias—Foreign judgment—Variance—Defects in affidavit 12
Assignment of debts to acquire jurisdiction 136
Carrier—See stoppage *in transitu*.....
Certiorari—See conviction....
Charity—See Mortmain 114
Chattel Mortgage—Fraudulent preference—Intent—Consideration—Description 17
Bill of sale—Affidavit of *bona fides*—Form of jurat—Omission of date and words.... 223
Cloud on Title—Tax sale deed 237
Commission—Under R. P. Act 112
Ex parte married woman.. 118
Company—Liability for acts of manager in false imprisonment..... 74
Right to hold lands—Mortmain 14
Injunction to restrain disposal of shares 24
Power of railway Coy. to pledge bonds—Effect of bonds wrongly charging land grant—Raising money 129
Dominion corpor. subject to prov. laws—Mortmain.... 186
Winding up—Insolvency—*Ultra vires*—Time—Exclusive or inclusive..... 193
Shareholder's right to sue in corporate..... 243
Company—*Contd.*
Examination of officers—Production of books..... 253
Winding up act—Liquidator's remuneration..... 114
Conflict of rules in pleading.. 33
Convict—Status and rights of 57
Conviction—See Appeal..... 155
Under Ord.N.W.T. gambling 122
Certiorari—By-laws and statute against gaming *ultra vires*..... 233
Summary—Application to veterinary act 32
Maintenance of wife..... 46
Jurisdiction—Want of affidavit—6 days notice.... 61, 62
Amendment after return.... 62
Certiorari—Appeal pending 88
Corporation—Foreign—Capias 12
See Company.
Costs—Attorney's bill of—Taxation..... ..... 13, 115, 177
Police court proceedings disallowed 7
Imprisonment for non-payment—Debtor's act 14
Security for—Mortgage under R. P. act..... 36, 42
Security for—Domicile..... 40
Security for—Application to increase 41
Security for—Interpleader—Settling form of..... 89
Security for—Extending time for..... 89
Of exam. de bene esse not used at trial—Taxation.. 43
Disallowance of for misstatement 24
Power and discretion to award on conviction 88, 137, 207
Charging order—Priority over registered mortgage 61
Where each party succeeds in part..... 67

Costs—*Contd.*
Certificate for — Retroactive effect of statute 90
Certificate for — Reasonable ground for action..... 189
Where defendant answers instead of demurring..... 116
Where no recognizance — Certiorari..... 137
Discharging order for security for after given..... 153
Payment out of security for in lapsed suit..... 172
Of appeals from county court —Irregularities 171
Mistake in consent decree.. 208
Of Mortgage — Redemption 245
Counsel—Signature of on demurrer..... 175
County Courts Act—See Appeal — Want of jurisdiction -- Cause of action..... 47
Criminal law—See Conviction—Extradition.
Larceny in foreign state — Proof of—Oral evidence.. 52
Maintenance of wife—Competency of evidence..... 46

D

Damages—In ejectment—What allowed 7
Special—Libel 102
Against mercantile agency.. 225
Against Crown 217, 220, 221
Debtors' Act — Imprisonment under 14
Debtor — Judgment - · Exemption Act.....122, 211
Judgment— Examination of married women 123
Examination of judgment debtor in county court.... 211
Decree—Form of foreclosure decree 208
Deed—See Tax Deed 30
Demand—Liquidated 248
Demurrer—See pleading.
Domicile—What constitutes.. 40
Discovery—See evidence—Examination — Interrogatories in N. W. T. 67, 98
Of company's officer and books.....246, 253
Of married woman .....
Discretion —Quashing by-law 151
Of referee 241
Of judge 167, 225
Duress—Payment under..... 48

E

Ejectment—Notice of trial.... 35
English Acts—Non-applicability to county court 12
Election—To proceed in action 172
Elections — Petition — Irregularities 250
Escape—Recapture 2
Estoppel—Negligence..... 220
By notice..... 186
Agency—Sale.....29, 69
Evidence—See Discovery.
Commission under R. P. Act 112
Ex parte married woman .. 118
Larceny in foreign state—Proof 52
Competency of wife as witness to prove marriage .. 42
Of substitution of debtor.... 21
Indicia of fraud..... 80
As to separate property 79
Of identity 183
Examination—See Discovery.
Evidence—Judgment debtor —Production of at trial 39
Execution—See Exemptions—Order staying..... 10
Effect of legislation—Priority of 164
On *fi. fa.* lands 107

Execution—*Contd.*
In county court.....
Writ of—Signature to 223
Judgment in Q. B. 127
Excess—See Abandoment.
Retroactive effect of..... 59
Exemptions—Of homestead—
And house—Above encumbrance 161
Of household goods 142
Occupation and cultivation.. 59
Of mortgaged lands R.P. Act 161
Expropriation—See Arbitrator 4
Extradition—Forgery—Interested witness—Corroborative evidence 249

F

Foreign Corporation—Right to capias 12,
Contract—Assets within jurisdiction 124, 241
Judgment—Action on 217
State—Larceny in..... 152
Forgery—See Extradition.
Fraud—On legislature..... 175
Indicia of..... 80
Misstatement and suppression 24
Fraudulent preference — See Chattel Mortgage.
What constitutes .... 17, 44, ... 72, 85, 228
Judgment—Rights of assignee 127
French speaking jury 140

G

Garnishee—See Practice.
Guarantee—Written—Statute of frauds—Uncertainty 133

H

Habeas Corpus—Penitentiaries Acts—Escape—Recapture .. 2
Highway—Diverting 186
Homestead—See Exemption.
Household goods—See Exemption.
Husband and Wife—See Discovery.
Evidence of wife against as to marriage..... 46
Separate estate in N. W. T.. 64
Separate estate—Proof of .. 79
Separate demurrer by wife.. 170

I

Imprisonment for debt—See Debtor's Act.
Improvements—See Municipal Law.
Indian—Half-breed grant—Taxation..... 235
Gratuity—Patent—Treaty .. 222
Infant—Deed of—Validity of.. 144
Information — By Attorney-General—Right of Crown to specific informance..... 9
Injunction — Application to continue — Insufficiency of affidavit to support..... 28
Application not *bona fide* .. 81
Liquor license act—Restraining conviction 106
To restrain issue of tax deed 140
No certificate of state of cause—Waiver 149
Misstatement or suppression 24
Insolvency—See Chattel Mortgage—Fraudulent preference.
Interest—See Assessment and Taxes.
Rate of—Mortgage..... 230
Interpleader—Stoppage *in transitu*—Issue—Power of referee to try..... 15
Fraudulent preference 44, 72, 98
Issue—Married woman's property..... 79

Interpleader—*Contd.*
Order—Rescinding 117
Defects in sheriff's affidavit—Waiver of plaintiff in issue Possession 211
Issue—See Real Property Act and Interpleader.

J

Joint Stock Company — See Company.
Judgment Debtor—See Debtor Final—See Practice.
Jurisdiction — See Appeal — County Court.
Jury—See French Jury.
Justice of the Peace—See Conviction.

L

Land Titles Act — See Real Property Act.
Landlord and Tenant—Mortgage — Re-demise clause — Creation of tenancy— Rent reserved — Agreement for lease—Specific performance —Excessive rent 226
Lease—See Landlord and Tenant.
Non-registration of — Real Property Act..... 7
Licence—See Company—R. P. Act—Conviction.
Lien—For contribution of taxes 236
Mechanics — Agreement — Waiving..... 233
Libel—See Practice — Special damage for 102
Liquidated demand 248
Liquor Licence—See Conviction
Local Option—See By-law.

M

Malicious prosecution — False imprisonment—Liability for acts of manager..... 74
Married Woman—See Husband and Wife—Debtor.
Mechanic's Lien—See Lien.
Mercantile Agency—Privilege —Damages..... 225
Misjoinder—See Practice.
Money in Court—Payment out of..... 172
Mortgage—Abortive sale—Priority of creditors..... 151
Right of mortgagee to purchase at tax sale..... 10
Power of sale without notice —Private sale..... 6
To Prothonotary for security for costs 42
Exemption of mortgaged lands—R. P. Act..... 161
Mortgagee, costs of in redemption suit..... 245
Rate of interest after due.. 230
Re-demise clause—Tenancy —Rent—Lease 226
Mortmain..... 186
Municipal Law—Right of Province to tax and sell Crown lands..... 30
Imposition of taxes—Unconstitutional..... 69
School assessment—Validity of..... 45
Tax sale unpatented lands—Duress—Recovery.... 48, 134
Redemption by joint owner —Contribution..... 50, 236
Assessment — What constitutes improvements..... 100
Defective notice of assesst.. 99
Validating acts—Taxes in arrear..... 104

Municipal Law—*Contd.*
Diverting highway-Defective notice — Quashing by-law 186
Buying in lands-Assignment of certificate..... .. 132
Injunction—Tax deed—Restraining..... 140
Roman Catholics—By-law—Right to tax..... 157, 195
Taxation of Half-breed land — Allotment..... 235
Tax sale—Effect and extent of tax deed-Cloud on title 237

N

Negligence — Reasonable accommodation..... 83
Of Crown's servants 219, 220, 221
Notice of Trial—See Practice.
Newspaper — See Pleading — Libel.
New Trial—When ordered.... 167
Grounds for under R. P. Act 216
Novation — Substitution of debtor..... 21
Accepted order-Right to sue 181

O

Official Assignee—Sole right to sue..... 17, 72, 85
Order — Accepted — See Novation.
Judges—See Practice.

P

Patent—Indian cancellation of —Improvidence..... 222
Identity of grantor of 183
Sale of unpatented lands.... 48
Partnership—Liability of for debts of individual partner.. 21
Penitentiary—Escape from .. 2
Performance—See Specific Performance.
Petition of right — Demurrer 219, 220, 221
Information—Construction.. 9
Practice—Appeal, matters *re*—See Appeal.
Attorney, matters *re*—See Attorney.
Interpleader, matters *re*—See Interpleader.
Capias, matters *re* — See Capias.
Certiorari, matters *re*—See Certiorari.
Costs—See Costs.
County Court—See County Court.
Debtors Act, matters *re*—See Debtor.
Examination, matters *re*—See Discovery.
Execution, matters *re*—See Execution.
Real Property Act, matters *re*—See Real Prop. Act.
Affidavit —For discovery — Proper party to make 246
Defects in on capias..... 12
In reply on injunction notice 38
Amendment at trial..... 95
Certificate of state of cause on injunction..... 149
Declaration—Filing in vacation 169
Demurrer— Married woman separately 170
Demurrer — To petition of right.....229, 220, 221
Demurrer — Pleading — Tax sale 237
Demurrer — Not signed by counsel..... 175
Demurrer —Tender of conveyance 101, 160
Effect of *fi fa* lands 107

Practice—*Contd.*
Demurrer — Redemption — Contribution 30
Convict's status..... 57
Accord and satisfaction .. 82
Wrong parties 243
Exhibits—Production at trial 39
Filing and stamping same —Custody of 35, 38, 92
Examination *de bene esse*.. 43
Filing papers—See Exhibit.
Irregularities — See County Court.
Jurat—Form of in Bill of Sale 223
Judgment—Transcript of .. 127
Judgment—Final 175, 248
Judgment — Summons set aside 124
Misjoinder of defendants 93, 95
Master's office—Mortgage—Abortive sale—Priority of creditor 151
Notice of trial in ejectment.. 35
Notice of motion—Short.... 249
Order rescinding referees .. 117
Verification of copy of.... 110
Variance of terms of sale.. 144
Order— Charging — Priority of over mortgage 61
Pleading — Abandonment of plea .....
Married woman—Variance 7
Distributively—Conflict of rules 33
Embarrassing — Striking out 155, 240
Embarrissing — Striking out foreign judgment.. 217
Trover-Trespass--*Jus tertii* 37
Libel--Accord and satisfaction 82
Special damage..... 102
Tender of conveyance....
Revivor 93
Security for costs--See Costs.

Practice—*Contd.*
Staying proceedings pending rehearing..... 96
At law and in equity in concurrent actions 172
Writ of attachment—Appeal —Waiver 126
Writ ex juris—Leave to issue 97, 228
Ex juris—Service..... 204
Ex juris—Summons to set aside 124
Endorsement 175
Returnable in vacation .. 169
Probate—See Wills.
Prohibition—See County Court
Jurisdiction — Abandonment of excess 203, 205, 246
Prothonotary—Mortgage to for security 42
Public Schools-See School Law
Primogeniture in Manitoba, 76, 97, 158

Q

Quashing By-law—See By-law.

R

Railway Company—See Company—Reasonable accommodation—Accident 83
Act—Land grant—Bonds .. 129
Act 1881 — Damage to property..... 220
Rate — See Municipal Law—Taxes.
Real Property Act — Adding pleas..... 120
Amendment of petition.... 88
Appeal from judge's opinion 91
Assignments— Priority of.. 197
Caveat—Irregularities in 146, 201
Caveator and caveatee..... 129
Commission cannot issue.. 112

Real Property Act—*Contd.*
Corporation's right to hold lands..... 114, 196
Costs—Security for..... 36
Grantor—Identity of in patent..... 183
Half-breed land—Taxation of 235
Infant's deed—Validity of.. 144
Irregularities in caveat 201
Issue—Formal..... 36
Issue to try validity of tax deed..... 30
Issue—Plaintiff in..... 94
Judge's opinion–Appeal from 97
Judgment–Petition on..... 251
Mortgaged lands–Exemption of 161
Mortgage — Power of sale without notice — Private sale..... 6
Mortmain— Added territory 196
New trial of issue—Application for..... 216
Patent—Evidence of identity of grantor..... 138
Petition—Allegations in.... 146
Petition— Amendment of .. 88
Petition—Dismissal of..... 216
Petition—Quashing–Defects in..... 214
Petition—On judgment 251
Pleas—Adding..... 120
Primogeniture 76, 97
Reference by registrar..... 132
Registration of old form instrument..... 7
Registration—Validity of .. 191
Security for costs 36
Taxation of Half-breed land 235
Taxation and sale of lands.. 30
Transfer—Unregistered—Priority of execution.... 164
Trusts..... 161
Recognizance—See Conviction
Referee—Discretion of..... 241
Revivor—See Practice..... 93

S

Sale of Goods—Agency—Estoppel..... 29, 69
Sale of infant's lands—Variance under order—Fiat.... 144
School Law—Assessment—Validity of..... 45
Right to tax Roman Catholics for..... 157, 195
Security for Costs—See Costs.
Seduction — Loss of service—Service..... 163
Sheriff—Possession by—Costs—See Interpleader.
Solicitor—See Attorney.
Stamps—Filing Papers — See Practice.
Statute of Frauds—Guarantee 133
Statutes—Interpretation—Construction of—Petition of right 9
Retroactive effect of..... 90
Validating..... 104
Provincial, re gaming—*Ultra vires*..... 233
Stoppage *in transitu*—Notice of seizure..... 1
Supreme Court—See Appeal.
Surety—See Guarantee.

T

Taxes—See Municipal Law.
Transcript of judgment—See Practice.
Trial by jury — See French Jury.
Trustee—Assignment by to co-trustee 229
Trust's—Under R. P. Act 161
Tenancy — See Landlord and Tenant.

V

Vacation—See practice.
Voters List—Informality..... 2

W

Will—Probate—Admission of.. 147
Probate—Renunciation 239
Witness—Fees in penal action 32
Interested, in extradition.. 249
Married woman against husband—Criminal law..... 46
Words and Phrases—Account "settled" or "stated".... 203
Words and Phrases—*Contd.*
Liquidated demand..... 248
Time "exclusive" or "inclusive"..... 193
"Or which has such effect" 229
"Raising money"..... 129
"Until principal is fully paid and satisfied"..... 230
Writ—See Practice.

THE

WESTERN LAW TIMES.

RECENT DECISIONS.

MANITOBA.

COUTURE v. H. B. CO.

DECEMBER, 1889.] [TAYLOR, C. J.

Interpleader Issue—Stoppage In Transitu—Where Goods Seized by a Creditor before Notice of Stoppage is given Carrier by Vendor.

Vendor's right to *stoppage in transitu* defeasible in only one way—that is where the goods are represented by the bill of lading, and when the vendee, being in possession, with the vendor's assent transfers it to a third person who *bona fide* gives value for it.—*Benjamin on Sales*, 3rd Eng. Ed. p. 856.

An attachment of goods while in the hands of the carrier does not defeat the right to stop in transit.—*Smith* v. *Goss*, 1 Camp. 282.

It is probable that a seizure by a sheriff under an execution against the purchaser would be held to terminate the *transitus* for the reasons suggested by CHAMBRE, J., in *Oppenheim* v. *Russell*, 3 B. and P., 42. *Blackburn on Sales*, p. 379.

Held—

In the absence of direct authority, that a seizure under an execution and removal of the goods by the sheriff from the possession of the carrier defeated the right to stop in

transit where notice of stoppage is given subsequent to the seizure.

Turnbull for execution creditor.

Perdue for vendors, H. B. Co.

"LISTS OF ELECTORS ACT, 1889."

FEBRUARY 13, 1890.] [RYAN, Co. J.

Voter's List—Informality—Residence—Signing Register.

Revision of voter's list, Electoral Division of Mountain. Exception taken to list of electors on ground that distinguishing letters "L" and "M" were not placed after elector's names as required by 52 V., c. 43, s. 3, but that the letter "L" or "M" was placed at head of proper column and the expression "do" used in repetition instead of proper letter.

Held—

The informality to be objectionable yet not fatal.

Also, that there being no provision in the "Lists of Electors Act, 1889," for the signing of the register by the enumerator as required by 49 V., c. 29, s. 18, sub-sec. 4, the date of the closing of each municipal list by the respective clerks of the municipalities in the electoral division pursuant to 52 V., c. 43, s. 3, sub-sec. 2, should be taken as equivalent to the date of the signing of the register for that municipality, and the elector applying to be put on the list should be resident in the electoral division for one month prior to the date of the closing of the lists by the clerk of the municipal ity in which he resides.

Archer Martin for applicants.

REGINA v. PETERSON.

FEBRUARY 15, 1890.] [FULL COURT.

Habeas Corpus—Penitentiaries Acts—Escape—Recapture—Warrant of Detention—Serving Out Unexpired Term.

Motion to make absolute rule *nisi* for *habeas corpus* calling on the Warden of the Manitoba Penitentiary to have in court the body of Albert Peterson, said to be detained in his

custody as a prisoner. According to records of General Quarterly Court, the prisoner was on 17th July, 1871, convicted on indictment, for feloniously receiving stolen goods, and was sentenced to "be confined in the Penitentiary of the Province, there to remain for three years at hard labor," and was on same day delivered at Lower Fort Garry to the Warden of the then Manitoba Penitentiary. On the 16th of October, 1871, prisoner escaped, and having supposedly gone to the United States, was re-arrested in Manitoba in May, 1889, and taken to the present Manitoba Penitentiary at Stony Mountain to serve out the balance of his sentence. Sec. 11, Cap. 155, Rev. Stat. Can., provides that "every one who escapes from imprisonment shall, on being retaken, undergo in the prison he escaped from the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape."

It was contended that, (1) there being no evidence that any warrant of commitment or copy of the sentence or written authority to hold prisoner had been given to the Warden at the time of the delivery of the prisoner to him, the imprisonment was illegal; (2) the term for which he was sentenced having expired before he was retaken, his retaking and detention are illegal: and (3) the prisoner being now confined at Stony Mountain and not at Lower Fort Garry whence he escaped, his detention is unlawful by the above statute.

Held—

(1) That the warden was not compelled to receive the prisoner without being provided with evidence of the judgment against him; he should have required it in strictness, but in so acting he took the risk of there being such a judgment and of being able to prove it when his authority should be called in question. *Reg.* v. *Bourdon*, 2 C. & K., 366; *The People* v. *Baker*, 89 N. Y., 460; *Rex* v. *Antrobus*, 6 C. & P., 688; *Gude's Crown Practice*, 279; *Reg.* v. *Richards*, 5, A. & E., N. S., 926, referred to.

(2) That the above provision of the Act respecting escapes authorizes the prisoner to be retaken and imprisoned

to undergo the remainder of the term unexpired at the time of his escape without being first tried and convicted of an escape, but KILLAM, J., expressed himself as not being *at present* satisfied but that the prisoner should have been duly adjudged by a competent court guilty of an escape or breach of prison before being made to serve out the balance of the unexpired term.

(3) That 34 Vic., Cap. 14, Sec. 7 (repealed in the revision of the Statutes) having provided that in the absence of any penitentiary building any common gaol or other place of confinement in the Province should be held to be a penitentiary for the confinement of persons lawfully convicted, under which Act the prisoner was sent to Lower Fort Garry, and the Penitentiaries Act, 38 Vic., Cap. 44, containing similar provision to that now found in Sec. 6 of the present Act; and the Governor-in-Council having proclaimed the tract of land at Stony Mountain to be a penitentiary for Manitoba, and the prisoner having been removed there from Lower Fort Garry; and the present Penitentiaries Act, Secs. 4 and 5, declaring this establishment to be a penitentiary of Canada; and the prison from which the escape was made being a penitentiary for Manitoba, and the one at Stony Mountain having been since declared by Statute to be a penitentiary for the Province; that by the effect of these statutes the prisoner is now in the prison he escaped from, although the location has since been changed.

Hagel, Q. C., and *Bonnar* for prisoner.
Aikins, Q. C., for the Warden.

Present—DUBUC, KILLAM and BAIN, J J.

In re NICHOLSON ET AL. AND THE RAILWAY COMMISSIONER.

FEBRUARY 21, 1890.] [TAYLOR, C. J.

Expropriation—Arbitrator Prejudiced—Application for his Removal.

The Railway Commissioner gave the usual statutory notice to arbitrate in the event of a certain offer, for land appro-

priated, not being accepted, and named E. G. C. arbitrator under the General Railway Act and 51 Vic., c. 5.

The offer was refused, and the name of J. S. was given as arbitrator on their behalf. This J. S., a real estate agent, had some time before placed the value of the property at $8,000, exclusive of damages to river front, and had handed such valuation in writing to the claimants, who sent same to Railway Commissioner. The latter had offered $6,000 in all.

Motion to annul appointment on the ground that he had prejudged the matter and that the Railway Act referred to a merely casual opinion and only to an arbitrator appointed by the court wherein it says "that the giving of an opinion by an arbitrator shall not be a ground of disqualification."

Held—

That the statute applied generally, and although he concurred in principle that an interested party should not be appointed, yet he was debarred by the statute from interfering.

That the statute did not only refer to a mere casual opinion, but covered a formulated judgment, as in this case.

Perdue and *Mathers* for Railway Commissioner.

Munson for arbitrator, J. S.

MERCHANTS BANK v. MULVEY.

FEBRUARY 21, 1890.] [DUBUC, J.

Promissory Note—Stat. 3 and 4 Anne, Cap. 9—Banking Act.

Action upon prommissory notes by endorsees for value, brought prior to and pending since 1884.

Held—

1. An action could be maintained by the endorsee for value of a promissory note payable to payee or order prior to 3 and 4 Anne, Cap. 9, which was passed for the "removal of doubts" as to whether an action could be so maintained.

2. That the Banking Act, giving the powers to banks of dealing in promissory notes and other negotiable securities "gave the right to bring an action."

3. That the statute above referred to was one relating to procedure, and hence in force in this Province, and is not

affected by the decision in *Sinclair* v. *Mulligan*, 5, M. L. R., the statute stating "that an action can be maintained," etc.

Tupper, Q. C., and *Phippen* for plaintiff.

R. J. Wilson for defendant.

Re SHORE.

MARCH 8, 1890.] [FULL COURT.

The Real Property Act, 1889—Mortgage—Power of Sale Without Notice —Private Sale.

Petition presented to District Registrar asking for a certificate of title, upon a title derived through the exercise of a power of sale in mortgage, which was "Provided that the mortgagees, in default of payment for two months may, *without any notice*, enter upon, lease, or sell the said lands." Two questions were submitted by the Registrar for the opinion of the Court: (1) Could the mortgagees sell after default without first having given notice of their intention to sell? (2) Could they sell by private sale without having publicly advertised the land for sale?

49 Vic., Cap. 42, Sec. 6, (Man.) provides that whenever any mortgage made in pursuance of the Act respecting Short Forms contains the following words: "Provided that the mortgagee, in default of payment for two months (or any other definite period) may without any notice enter and sell, etc., or words to like effect, such mortgage shall be deemed to contain the words," in the Short Forms Act, which provide for notice.

Held—

(1) That notice was required and that the Act (49 Vic.) did not add another power of sale to the mortgage. Harshness of a power to sell without notice commented upon. *Coote on Mortgages*, p. 249; *Miller* v. *Cook*, L, R. 10 Eq. 637; *re Gilchrist and Ireland*, 29 Gr., 544, referred to.

(2) That a mortgagee is not, strictly speaking, a trustee of the power of sale, but it is given for his own benefit to enable him the better to realize his debt, and if he exercises it *bona fide* for that purpose without corruption or collusion with the

purchaser, the Court will not interfere, even though the sale be very disadvantageous, unless, indeed the price is so low as to be in itself evidence of fraud, and that the sale is not invalid if *bona fide*, after notice, although there is no advertisement. BAIN, J., commented upon *Richmond* v. *Evans*, 8 Gr., 508, and followed *Warnor* v. *Jacob*, 20 Ch. D., 220, approved of in *Marlins* v. *Clowes*, 21 Ch. D., 857, *Davy* v. *Durand*, DeG. and J., 535.

C. P. Wilson for Attorney-General.

Culver for petitioner.

Present—TAYLOR, C, J., KILLAM and BAIN, JJ.

SHORE v. GREEN.

MARCH 8, 1890.] [FULL COURT.

Pleading—Abandonment of Plea—Married Women—Lease—Real Property Act—Registration of Instrument—Variance—Covenant for Quiet Enjoyment—Damages—Costs.

Lessee, a married woman, by an attorney, sued lessor for breach of covenant for quiet enjoyment. Lessor pleaded in abatement lessee's coverture, and lessee replied, alleging (1) marriage with present husband, ante 14 May, 1875, without settlement; (2) acquisition of demised premises for separate estate; and (3) sustainment of damage in reference to that estate. Lessor rejoined, alleging, *inter alia*, what were virtually pleas in bar. Plaintiff demurred to these rejoinders, and order was made on defendant's application, giving him liberty to add further pleas to the effect of the matters rejoined, and accordingly there appeared *non est factum*, and other pleas in bar. Verdict entered on trial by the Chief Justice for $748.43, with leave reserved in term. On motion by defendant to reverse verdict, etc., the chief objections were, that the property in the lease not being plaintiff's separate property, the husband should have been joined, and, that she could not sue by an attorney.

Held—

That, even if these objections were valid, yet defendant was precluded from taking them; both being matters in

abatement, they should have been disposed of on the plea in abatement, and the defendant, having added pleas in bar after plaintiff's replication to the plea in abatement had waived and abandoned his plea in abatement, and it was too late to take the objections.

The lease in question, dated Aug. 1, 1888, for five years from 1 Sep. same year, was made "In pursuance of the Act respecting short forms of *Leases*," and the covenant therein in question was, "The said lessor covenants with the said lessee for quiet enjoyment." Certificate of title under Real Property Act of 1885, issued to lessor on 15th March, 1888. Lessor transferred on 27th April, 1889, to one *Early*. Lease unregistered.

Held—

(1), That the lease purporting to be made in pursuance of the Act respecting short forms, not of "indentures," but of "leases," was yet sufficiently referred to, to give plaintiff the benefit of the covenant in the schedule to the Act; that the instrument was effectual to create the term and found the action; and, it conforming substantially with the form given in the schedule to the Real Property Act, 1885, could be registered in the Land Titles office;

(2) That, even if the lessee were guilty of negligence in not registering the lease, yet the lessor, by taking advantage of that negligence, placed it in the power of his transferee to evict lessee, and the transferee coming plainly within the words of the covenant, and the lessor having distinctly undertaken that his assigns should not disturb lessee; therefore, the lessee's negligence, through which the lessor was in a position to enable his transferee to do so, constituted no defence to the action, and the lessor was liable; and, per *Killam J.*, that—adhering to his views expressed in *Shore v. Early*, unreported—under this Act the transfer took effect absolutely, irrespective of any notice to the transferee of the plaintiff's lease;

(3) That the costs of the prior action of ejectment by lessee against transferee—the latter having taken possession *vi*

et armis—were rightly allowed, following *Child v. Stenning*, 11, Ch. D. 82, *Williams v. Burrill*, 1, C. B. 402, and *Lock v. Furze*, 34 L. J., C. P. 201; but costs of proceedings, amounting to $75, the police court, in absence of definite evidence as to the nature of proceedings and plaintiff not appearing to be a party thereto, but the matter having apparently arisen out of a quarrel between her husband and the ejector, were disallowed, and verdict reduced by that amount; yet, defendant having substantially failed in the application, was ordered to pay the costs, the appeal being almost wholly argued on grounds on which he failed.

Howell, Q.C., and *Elliott* for plaintiff.

Mulock, Q.C., and *West* for defendant.

Present—DUBUC, KILLAM and BAIN, JJ.

ATTORNEY-GENERAL OF CANADA v. McDONALD, *et al.*

MARCH 8, 1890.] [FULL COURT.

Information—Construction of Statute—Specific Performance of Agreement to Pay Money.

Information by Attorney-General on relation of C. J. C. against G. N. W. C. Railway, incorporated under 49 Vic., Cap. 11, Can. It alleges that S. and M. Railway, which was merged in G. N. W. C. Railway, made a contract with co-defendants, McD. and P. for grading, etc., that McD. and P. *sublet* same to relator, that the latter performed contract satisfactorily, that he is indebted to numerous workmen thereon and is unable to pay same, that the accounts are disputed and prays for an account, etc. The information is based upon a charter issued in pursuance of Act cited, a section of which is to effect that G. N. W. C. Railway shall be liable for all debts justly due by its predecessors, and they covenanted with the Queen, that they would fully pay and discharge all just claims . . . . due by contractors for labor, board of laborers, and building materials, and cause such to be paid by the contractors. The entire contract was sublet by the contractors.

The defendants demurred for want of equity and parties, claiming that the workmen should be made parties.

Held—

(1.) That a Court of Equity will not decree specific performance of a covenant or mere agreement to pay money. Lord Chanc. King in note to *Hall* v. *Hardy*, 3 P. W. 190; *Fry Spec. Performance*, 434.

(2.) That although the Crown can choose its *forum*, and sue in any court, this suit cannot be maintained in a Court of Equity, because the Crown claims nothing herein.

(3.) That the Statute cited only provided for payments to contractors, this information alleging that payments were due by the contractors to C,, and from C. to his workmen, there was no claim under the Statute.

(4.) That the ordinary rule of pleading is that, all persons must be parties to the action, and where they are not, the record must disclose a sufficient reason for departure from the settled rule, *e. g.*, too numerous, etc. *Michie* v. *Charles*, 1 Grant, 125; *Holland* v. *Baker*, 3 Ha., 76; *Wilson* v. *Stanhope*, 2 Coll. 629.

(5.) That a bill *quia timet* for performance of a covenant or agreement by way of indemnity, against the liability of the covenantee or promisee, might be supported, upon the authorities referred to in *Horsman* v. *Burke*, 4 Man. L. R., per KILLAM, J.

Crawford and *Elliott* for relator.

Munson for demurrer.

Present—TAYLOR, C. J,, KILLAM and DUBUC, JJ.

MILLER v. McCUAIG.

MARCH 17, 1890.] [TAYLOR, C. J.

Order Staying Execution—Judgment Satisfied—Mortgagee's Right to Purchase at Tax Sale.

In February, 1883, the defendant mortgaged certain lands to the plaintiff for a period of twelve months. Plaintiff became mortgagee in possession after due date thereof. In 1885 the lands were sold for taxes to the plaintiff, and he ob-

tained deed in September 1887. In November, 1887, plaintiff sued on covenant on mortgage and signed judgment. Plaintiff, while in possession, removed a large grain warehouse off property.

Held—

1. That it is not necessary to file a bill in equity for an injunction to restrain proceedings upon a judgment if satisfied, but that the same may be stayed or marked satisfied upon a summons in chambers.

2. That a mortgagee may buy property at a tax sale just as a stranger, and can resist a suit to redeem, but that if he uses his position as mortgagee to enable him to buy or purchase, he cannot set up the title so obtained against the mortgagor's right to redeem, following *Kelly* v. *Markham*, 14 Grant, 29.

3. That if the mortgagee sues on the covenent after buying at a tax sale he must be held as having elected to treat the mortgage as still redeemable as after a final order of foreclosure. *Schofield* v. *Dickinson*, 10 Grant, 226; *Smart* v. *Cottle*, 10 Gr., 59; as to mortgagee's right to buy at tax sales, see *Kelly* v. *Markham*, 14 Gr., 29.

4. That a mortgagee cannot sue for the mortgage money when he has put it out of his power to reconvey the property. *Lockhart* v. *Hardy*, 9 Bla., 349; *Palmer* v. *Hendrie*, 27 Beav., 349; *Garland* v. *Garbutt*, 13 Gr., 578; *Burnham* v. *Galt*, 16 Gr., 417.

5. That the mortgagee had a right to sue on his covenant herein, and having committed waste was liable to account therefor upon a bill being filed to redeem.

Munson for plaintiff.

Hough for defendant.

PRACTICE.

McLEOD v PEARSON.

APRIL, 1889.]

County Courts Act—Appeal—Bond—English Acts.

Application by plaintiff for leave to appeal under section 244 County Courts Act, 1887, where all proper proceedings were taken under section 243, but bond not filed until twenty-one days after application for reversal refused.

Held, per ARDAGH, Co. J.,

That plaintiff was not entitled to an appeal on the merits.

Upon application by way of appeal, as required under section 244.

Held, per DUBUC, J., (in Chambers.)

1. That an appeal was apparently allowed under sec. 244 without any of the preliminaries required by sec. 243, such as giving security, notice of intention to appeal, etc.

2. That the judge being at liberty "to make such order allowing the appeal or otherwise" (see sec. 244), and the plaintiff having filed a bond, he would order that the appeal be allowed upon the giving of such bond to the satisfaction of the judge appealed from.

3 That Acts relating to County Courts in England do not apply here, we having our own County Court Act.

Huggard for plaintiff.

Hough for defendant.

POWER MANF'G. CO. v. JACKSON.

FEBRUARY 21ST, 1890.] [IN CHAMBERS, KILLAM, J.

Capias—Foreign Corporation—Variance—Erasure.

Defendant *capiased*, while passing through Province at the instance of a foreign corporation, not doing business with-

in the Province, and debt contracted outside of it. Summons to set aside *capias*.

Held—

1. That erasures and interlineations, not initialled in affidavit, upon which order for *capias* issued might be a reason for dismissing a summons issued upon such material, but that, in the absence of authority to the contrary, he would hold that after the order was made, the *capias* was not invalid on those grounds.

2. That a variance in the order for *capias* from "Powers" Manf'g. Co. to "Power" Manf'g. Co. was not material.

3. That, in the absence of specific evidence, it would be presumed, upon this application, that a foreign corporation was entitled to sue and recover in this Province, and that the whole cause of action would not be determined upon this application.

Cumberland for plaintiff.

Culver and *O. H. Clarke* for defendant.

Re ASHBAUGH, AN ATTORNEY.

MARCH 1, 1890.] [TAYLOR, C. J.

Attorney—Indictable Offence—Rule to Compel Answer to such a Charge —Costs.

The Law Society of Manitoba obtained rule *nisi* calling an attorney to show cause why rule should not issue to compel him to answer matters contained in certain affidavits and papers filed. Objection taken on behalf of attorney that court will not require attorney to answer affidavit charging indictable offence. Urged, in reply, that the charge here is that the attorney entered into an agreement which is illegal and void, and one which the court would not enforce as being contrary to public policy; and that, having so acted, he is not a fit and proper person to remain on the roll of attorneys.

Held—

That the charge being one of compounding a felony, and the weight of authority being decidedly against

making absolute a rule calling on an attorney to answer matters which may be made the subject of an indictment, the rule *nisi* should be discharged but without costs. *Cordery on Solicitors*, p. 141; (Anon. case there reported not in library); *Short* v. *Pratt*, 1 Bing., 102; *In re Knight and Hall*, 1 Bing., 142; *In re* ————, 5 B. & Ad., 1088; *Stephens* v. *Hill*, 10 M. & W., 28; *Re Patterson* v. *Miller*, 1 U. C., 256; *Re Blake*, 3, E. & E., 34; *Re Hill*, L. R., 3 Q. B., 543; *Re King*, 8 Q. B., 129, referred to.

Howell, Q. C., for the Law Society.

Ewart, Q. C., for attorney.

WATERS v. BELLAMY.

MARCH 27, 1890.] [TAYLOR, C. J.

The Debtor's Act—Imprisonment for Non-payment of Costs.

Defendant non-suited the plaintiff on appeal from verdict for breach of promise—set aside for lack of corroborative evidence—and recovered judgment for costs. Plaintiff stated to defendant's attorney that she had money in her pocket more than double the amount of the costs for which defendant had judgment, and that if she thought the judgment were a just one she could pay it. Affidavits were filed, and an application was made to commit the plaintiff to prison in default of payment under The Debtors' Act, 1869.

The Act provides that in default of payment the Court may make an order for imprisonment not exceeding six weeks.

Held—

That sufficient circumstances were shewn to entitle the defendant to an order committing the plaintiff, which was that in default she be committed for *one* day.

"The spirit of Legislation in this Province, as shewn by 48 Vic., cap. 17, sec. 76, sub-secs. 2 and 3, is against imprisonment for non-payment of costs and especially against the imprisonment of a woman. Then I cannot overlook the fact that the imprisonment, if any, would be in the jail of the

Central Judicial District, which has again and again been condemned by grand juries as unfit for any human being to be detained in."

See also 6, M. L. R., 295.

Patterson for plaintiff.

McLean for defendant.

GALT v. McLEAN.

MARCH 17TH, 1890.] [TAYLOR, C.J.

Interpleader Issue—Power of Referee to try same.

Certain goods were seized by the Sheriff. Defendant's son claimed the goods under a prior seizure and sale to him. The Sheriff interpleaded. The claimant filed affidavits in support of his claim, and he was cross-examined, when the referee made an order barring him. The latter appealed to a Judge in Chambers. Section 53, A. J. A., 1885, deals with the procedure relating to interpleader matters, and as to the power of directing an issue or otherwise, and concludes, " or a Judge may, in a summary manner by his order, dispose of the whole question." Sec. 56 of same Act, provides that a Judge in Chambers may determine and dispose of the merits of the claims in a summary manner. Sec. 72, provides also for the summary disposal of the issue or fixing a day therefor, by a Judge in Chambers. By Gen. Order 92, the referee has the powers of a Judge in Chambers in Sec. 53, A. J. A., but he has not the powers of the Judge given in Secs. 56 and 72.

Held (1), That, where an interpleader summons fails to be disposed of upon a matter of practice, *e. g.*, where the Sheriff, by his delay in having taken indemnity from one of the parties, is not entitled to apply, when, either the execution creditor or the claimant fails to appear on the return of the summons, where either of them, though appearing, declines an issue, where the claimant, though appearing, fails to support his claim by any evidence which can be looked at, or some such state of circumstances, the referee cannot dispose of the matter summarily.

(2) That, where the claimant does support his claim, and the question is whether he has merits or not, he should refer the matter to a Judge to be dealt with.

Appeal allowed, issue directed in the county court.

Hough for execution creditor.

C. H. Campbell for claimant (appellant.)

THE

WESTERN LAW TIMES.

NOTES OF RECENT DECISIONS.

MANITOBA.

STEPHENS v. McARTHUR.

MAY 1, 1889.] [BAIN, J.

Assignments for benefit of creditors, 49 Vic. Cap. 45—Interpleader—Chattel mortgage—Consideration—Description—Official Assignee.

Issue to try validity of chattel mortgage, executed Dec. 8, 1888, by M. and R. to plaintiff, as against an execution subsequently issued by defendant. Execution in sheriff's hands on 26th Jan., 1890. The mortgagors subsequently assigned, but not to official assignee. Seizure on 5th Feb., 1889. Mortgage expressed to be given to secure $870.34. For a large portion of this M. and R. had given notes to plaintiff, which were still current and held by Commercial Bank, endorsed by plaintiffs as collateral security for advances made to plaintiff. Objection taken on behalf of defendants that:

(1) Mortgage is void for not setting out true consideration, part of the debt represented by the notes being in reality due to the bank as holder. *Bathgate* v. *Merchants Bank*, 5 M. R., 210.

(2) The description is insufficient, it merely enumerating the various articles contained in the premises, without

stating them to be all the articles therein, and did not sufficiently distinguish between those covered by the mortgage, and others of a similar kind, which might or might not be so covered. *McCall* v. *Wolf*, 13 S. C. R., 133.

(3) That the chattel mortgage was void as a preference within the meaning of 49 Vic., Cap. 45. *River Starch Co.* v. *Sill*, 12 Ont., 567.

Counsel for plaintiff rebutted objections, and further contended, that the security was valid under 50 Vic., Cap. 8, Sec. 1, s.s. 4; that 49 Vic., Cap. 45, is *ultra vires.*

Held—

(1) That although the plaintiff had taken the notes of the defendants for a large portion of the account, which notes were still current and then held by the Commercial Bank with the plaintiffs endorsement, as collateral security for advances made to the plaintiff; the debt represented by them was a debt due to the plaintiff and not to the Bank, and was therefore properly described in the chattel mortgage as a debt due to the plaintiff. *Fish* v. *Higgins*, 2 M. R., 65, was not overruled by *Bathgate* v. *Merchants Bank*, 5 M. R., 210, but was weakened by it, and may probably be reversed if the question should come before the full court.

(2) That though the description of the goods in the mortgage did not state them to be all the goods in the premises, it was open to the mortgagee to prove by evidence at the trial, that they were in fact all the goods on the premises at the time, as this had been done, the description was sufficient. *Hovey* v. *Whiting*, 14 Sup. Ct., 515, explaining *McColl* v. *Wolf*, 13 S. C. 130, followed.

(3) That the chattel mortgage had the effect of a preference, within the meaning of section 2 of the Act respecting assignments, and is therefore void. "At the time the chattel mortgage was executed, M. and R. were undoubtedly insolvent, and unable to pay their debts in full;

but it does not appear that Stephens was aware of this, as far as the evidence shews, and the mortgage was given in response to a *bona fide* demand by Stephens for security for his debt. I do not find it was given with any such intent, either on the part of Stephens or the debtors, as would render it fraudulent and void, under the statute of Elizabeth, in the first part of Sec. 2, in the above Act respecting assignments. * * * * I think the words used in section 2 plainly enough declare, that a conveyance, etc., which has the effect of giving the creditor to whom it is made a preference over other creditors, shall be void as against other creditors, if the debtor when he made it was insolvent and unable to pay his debts in full. * * * * I am unable to agree with the opinion expressed by Patterson, J. in *Kennedy* v. *Freeman*, 15 O. A. R. 19, that the question of intent is still material, and I agree with Osler, J., where in the same case, he says, page 231, 'I think it says in plainly expressed words, that if either the intent or the effect of the transaction is to prefer, that is all that is necessary to void it.' Holding this view, then, I feel I am bound to find that, as the chattel mortgage in question has worked a preference, it is void."

(4) That the advances made by the plaintiff to M. and R. after the mortgage had been given, did not bring the transaction within Sub-sec. 4, of Sec. 1, of the amending Act 50 Vic., Cap. 8, above set out.

"The provision in the section is a somewhat peculiar one, the application of which will have to be carefully guarded, and limited to cases that come within the spirit, as well as the words of the sub-section. At or about the time the mortgage was taken, Stephens seems to have promised generally, that he would keep the business along until work began again in the spring; and M. having agreed to sell out his interests to Mrs. R. on the 22nd of December, he advanced the $100 to pay M., and afterwards

in January he advanced a further sum towards settling a suit which the landlord had brought for overdue rent. But to secure the payment of these sums he took an assignment of the book debts, and while it is probably true enough, that if the chattel mortgage had not been given, he would not have advanced the money, still the two transactions were distinct and independent and the one is not in any way the consideration for the other."

(5) That as the assignee was not one of the official assignees, referred to in the said Act respecting assignments, he had not the exclusive right referred to in section 7 of that Act.

"Section 7, along with all the other sections of the Act of 1886, subsequent to section 3, relates only to cases where there has been a voluntary assignment to an assignee recognized as such by the Act and amendments and to the procedure thereupon. In other cases the rights of creditors to sue to rescind the transaction, that section 2 declares to be void as against creditors, remain as they were before the Act."

The question as to the Act being *ultra vires* discussed as follows:

"Whether this Act, as a whole, is one which the Provincial Legislature had jurisdiction to enact, is a question that is open to very great doubt, but in view of the result of the cases of *Clarkson* v. *Ontario Bank*, and *Edgar* v. *Central Bank*, 15 Ont. Ap. Cases 166; in which the validity of the Ontario Act, 48 Vic., Cap. 66, from which ours is substantially taken, was very fully discussed, I will not presume to decide that the Act is *ultra vires*. In Ontario, pending an authorative decision, the Act is assumed to be valid, per Osler, J., *Clarkson* v. *Sterling*, 15 Ont. Ap. Cases 243; and I shall assume that our Act is valid here."

Verdict for defendants.

Howell, Q. C., and *Wade*, for plaintiff.

Crawford, and *Elliott*, for defendants.

[NOTE—The plaintiff appealed, and case was argued before Full Court on 8th and 9th July, 1889. Judgment not as yet delivered, pending Supreme Court decision.—ED.]

WATEROUS ENGINE WORKS v. RUSSELL, *et al.*

JULY 22, 1889.] [FULL COURT.

Partnership—Liability of for debts of individual partner—Novation — Evidence.

Defendant Stewart agreed to purchase from plaintiffs, an engine and boiler for a saw-mill. The goods were delivered in July, 1884. Sometime before delivery, Stewart entered into partnership with the defendants—Russell, Forbes, and Ross, on 22nd Aug., 1884, under name of Stewart & Co., for the manufacture of sawn lumber in Fort Ellice. Stewart was sole manager, other defendants residing at Ottawa. Plaintiffs sought to charge defendants with balance due on machinery under the aforesaid agreement with Stewart, and for other machinery subsequently purchased by Stewart and used in said business. The plaintiffs were shown to have charged the machinery, etc., in their books, to Stewart, and to have taken notes from him in his individual name. Payments had been made from time to time, and all applied to reduce what was purchased under the afore-mentioned agreement, the plaintiffs having so appropriated the payments, in the absence of any stipulation on the part of the defendant Stewart, who paid the same, as to how they should be applied. The defendants, other than Stewart, repudiated any liability.

The case was tried before MR. JUSTICE DUBUC, without a jury, who gave a written judgment, on 17th April, 1889, entering a verdict for the plaintiffs for $1,838.45, with costs.

The defendants appealed.

Held—

That, although sales of goods made to a party, who subsequently entered into a partnership, may not be binding upon the firm, even should articles be used in the firm's business, yet there may be dealings, and such notice to the partnership, as will in certain cases render partnership liable.

KILLAM, J., delivered the judgment of the Court.

"The plaintiffs' agents appear to have first learned in December, 1884, that Stewart had partners, and at sometime in 1886, who they were." * * * *

"At the trial before my brother DUBUC, the plaintiffs' counsel abandoned any claim under the agreement." * * * *

The defendants have moved to have verdict set aside, a verdict for the defendants, or a non-suit upon the grounds, *inter alia* :—

(1) That no contract of the defendants was proved, nor on their behalf, nor any liability shown.

(2) That, at all events, there should have been a verdict for the defendants for the goods purchased before the partnership, for those previous to the exchange of machinery, and for those charged upon and in connection with the exchange.

(3) Improper reception of evidence particularly, questions asked of the defendants who were examined as the plaintiffs' witnesses upon commission, and certain entries in defendants' books.

"There seems no sufficient reason for granting a new trial on the grounds of improper reception of evidence. The books of the firm would clearly be admissible in evidence, and no objection has been argued, that it was the books themselves, and not oral evidence of their contents, that ought to have been produced to the Court. It is clear that Stewart, as managing partner, would have authority

to purchase many of the articles sued for. The evidence offered for the plaintiffs, of the various articles supplied, and the prices, is vague and unsatisfactory; but we find in all of the entries in the defendants' books, $394 credited to the plaintiffs, over and above amounts referable to the other items charged for, which is within a few cents of the aggregate of the two amounts charged by plaintiffs, viz: $202.59 and $191.75," * * * * "no question can arise as to Stewart's personal liability for these, which would be presumed to be ordered for the firm, for whose purposes the articles were used, as Stewart tells us. I think the plaintiffs, upon the evidence, are entitled to recover that amount. 'I think,' Stewart "also acted for the firm when he requested the plaintiffs to pay freight on machinery," * * * * "and that he had authority to do so." * * * "If the firm was, as between itself and Stewart, to pay the subsequent instalments upon machinery purchased under the agreement, * * * *a fortiori*, it should pay the cost of transportation, and Stewart would have authority to incur the liability for it. But in respect to the machinery ordered before the formation of the partnership, and the alteration similarly ordered, no such presumption could arise, as the firm could only be liable to the plaintiffs in the case of a *novation*. The entries in the books are not sufficient to show a *novation*, being sufficiently rebutted by the evidence of the defence, and are made by Stewart alone. * * * This consideration destroys the importance of the entries as evidence of a direct liability of the firm, rather than that of Stewart alone, to the plaintiffs. Stewart says he bought the machinery on his sole credit, and that the exchange of engines was upon a lien contract; if so, the plaintiffs could not sue here for amount due under same, as and for goods sold and delivered. The defendants have not asked for a reduction in the amount of the verdict, but only for a verdict

for themselves, or a new trial. They are entitled to succeed at least in respect of the amount allowed for the cost of lengthening the saw-carriage, as Stewart ordered it before the partnership was formed. The plaintiffs are entitled to succeed for some amount, and at least to the amount of $584, as I have mentioned. *Prima facie*, the defendants herein cannot have a verdict, but are entitled to a new trial, unless the plaintiffs will accept a reduction to such an amount, as we can clearly find defendants liable for. In my opinion, therefore, there should be a new trial without costs, unless the plaintiffs will accept a verdict for $594, without costs of the application in term.

A. E. McPhillips, and *Sutherland*, for plaintiffs.

Ewart, Q.C., and *C. P. Wilson*, for defendants.

Plaintiffs counsel accepted a verdict for $594.

[*Present*—TAYLOR, C. J., KILLAM and BAIN, J. J.]

WINNIPEG & HUDSON BAY R'Y. v. MANN, *et al.*

MARCH 24, 1890.]]KILLAM, J.

Injunction—Misstatement or suppression of facts—Effect of—Costs.

The defendants, M. & H., entered into a contract for the construction of forty miles of plaintiff's railway. Under the contract, M. & H. were to make certain advances, for which amounts, and for the contract price of the railway, they were to be paid by plaintiffs. The work to be done on the railway was to be equal to the standard of the C. P. R., as exacted by them from their contractors, who constructed their line through a similar country. As security for such payments, the defendants, M. & H., were to be entitled to receive from the manager of the Bank of Montreal preferential bonds of the company, with him deposited, to double the amount of the advances, and the contract price, less $6,400 per mile, in Provincial bonds, to be paid to defendants. This payment of Provincial bonds

was made. After the alleged completion of the contract, the defendants, M. & H., obtained possession of the bonds so deposited to the number of seventy-seven for £1,000 each, and subsequently secured judgment against plaintiffs for the amount of the advances. The plaintiffs filed a bill to restrain the defendants from disposing of these bonds, and to have the delivery of them by the Bank declared illegal, upon the ground that they were obtained by misrepresentation, and that the issue of the bonds by the company was *ultra vires* of the company, as not having been disposed of for the purpose of raising money. The plaintiffs obtained an *ex parte* injunction to restrain defendants from parting with or disposing of these bonds. On the motion to continue the injunction, it appeared that the fact of a ratification of the contract by the plaintiffs had been suppressed in the bill, and "a misstatement of a very material fact" occurred in the affidavit. It was contended on behalf of the defendants that this suppression and misstatement debarred the right of the plaintiffs to have the injunction continued.

Held—

That, while this would undoubtedly be the case according to the old practice in England and in Upper Canada, if the injunction had been granted *ex parte* to continue till the hearing, and this were a motion to dissolve it; yet, the order in this instance being similar to that styled an *interim* order under the English practice, it clearly should not be regarded with the same strictness as the former; the suppressions of material facts not being such as would justify the extreme course of refusing to entertain the motion, for if the facts which were suggested as being suppressed had been stated, they really placed the matter in no stronger position than than those which were stated. *Burbank* v. *Webb*, 5 Man. R., 264, specially considered. *Stewart* v. *Turpin*, 1 Man. R., 323, considered in relation to *Hynes* v. *Fisher*, 4 Ont., 60.

Held, also—

(1) That a distinct ground for the interference of the court, based on principles peculiarly equitable, having been raised by the bill and evidence; and having reference to these considerations, to the nature of the bonds, and the injury to the company of having them transferred to innocent holders, and to the probability of the motion being at once renewed, if dismissed; the court would, though not without some hesitation, enter upon consideration of the circumstances under which defendants acquired possession of the bonds, the charges of misrepresentation, etc.

(2) That it is so important that parties should deal truthfully and fairly with the court upon *ex parte* motions for these *interim* orders, that this case is not to be understood as deciding that the motion to continue would be entertained in a matter in which these conditions are not found. Remarks of V. C. Wood in *Fuller* v. *Taylor*, 9 Jur. N. S., 743, approved of.

The court to mark its sense of the misstatements of the company's ratification of the agreement, and of the utterly unreasonable and unjust efforts of those connected with the plaintiffs to evade their being held bound by the contract, apart altogether from the question of their being technically and legally bound by it, not only refused the plaintiffs any costs of the motion in any event, but continued the injunction as to that portion of the bonds applicable to the contract price, exclusive of the advances, only upon the terms that the defendants were to be entitled in any event of the cause, to the costs of the application, although they succeeded only in part. The plaintiffs also put on terms to go to a hearing at the next sittings.

Injunction continued as to part, on terms, until hearing.

Howell, *Q. C.*, and *Tupper*, *Q. C.*, for plaintiffs.

Ewart, *Q. C.*, and *Munson*, for defendants, M., H. & R.

McLeod, for defendants, the Imperial Bank.

SINCLAIR *et al*, v. CLEAVER.

APRIL 7, 1890.] [BAIN, J.

Trover—Trespass—Jus tertii.

The plaintiffs were the contractors for the clearing and grading of a railway, the line of which crossed a wood-lot of the defendants. The specifications under which the plaintiffs were working required them to clear the right of way, "to the extent required by the engineer, of all trees, bushes, logs, and other perishable material, which shall be destroyed by burning." Plaintiffs, by permission of the engineer and manager, instead of burning the wood cut on defendant's lot, cut it into cordwood and piled it off the roadbed on defendant's lot.

The railway company were assignees of the Crown's right, but the defendant had not yet been paid for his land.

The declaration contained counts in *trover* and *trespass*, to which the defendant pleaded generally, and added a plea that the goods mentioned were not the plaintiffs' as alleged.

Held—

(1) That under the provisions of 51 Vic., c. s. 17, by which the Crown entered and took possession of the defendant's land, the same became vested in the Crown and its assigns, and that the defendant was divested of any property in, or title to, the land, and therefore had no right to the wood or any part thereof.

(2) That although the plaintiffs have not shown any title in the wood, as against the Crown, apparently the true owners of it—yet the plaintiffs were in posseession of it, and entitled "to maintain trespass or conversion."

(3) That possession with an assertion of title, or even possession alone, gives the possessor such a property as will enable him to maintain an action against a wrong-doer; for possession is *prima facie* evidence of the property.

Jeffers v. *G. N. Ry.*, 5 E. & B., 801; *Wilbraham* v. *Snow*, 2 Wms. Sand., 96; *Rockman* v. *Jessup*, 3 Wils., 332; *Buckley* v. *Goss*, 32 L. J. Q. B., 609. The defendant here did not attempt to justify under a *jus tertii.*

Verdict for plaintiff for $185.

Perdue, for plaintiff.

Culver, *Q. C.*, for defendant.

ROWAND v. MARTIN, *et al.*

APRIL 12, 1890.] [KILLAM, J.

Application to continue injunction—Affidavit in support, insufficiency of discussed.

This was an application to continue an injunction restraining the Railway Commissioner of Manitoba from proceeding upon an award. Bill of complaint charged misconduct, collusion, improper inducement, and insufficiency of awards for lands appropriated, and prayed that the award be set aside.

The application was supported by an affidavit of the plaintiff's solicitor, who swore that he had "obtained" the lands for plaintiff, that he had sole control of them from the time of the plaintiff's acquisition to the date of the affidavit, and that he had acted as solicitor for the plaintiff in the arbitration; to which was added; "That the facts stated in the bill of complaint herein are true in substance and in fact, and to the best of my knowledge, information and belief." The allegations in the bill were very general, with the exception of the particular facts referred to below.

Held—

(1) That such an affidavit was wholly insufficient to form the ground of an interlocutory injunction, and even if the plaintiff himself had made affidavits of such a tenor, they would be insufficient, for, *inter alia*, not showing by whom he was informed, etc.

(2) That the facts that an arbitrator was engaged by a government official (the Municipal Commissioner) contemporaneously with the arbitration, and was paid out of public funds before the arbitration ended; that according to the Public Accounts of the year during which the arbitration took place, he had received various fees for arbitrations; and that he had been offered a government position within one month after the arbitration ended, and been appointed to one within two months after the award, were not in themselves sufficient grounds to justify a continuance until the hearing.

Appeal dismissed with costs.

Kennedy, Q. C., for plaintiff.

Cameron, and *Mathers*, for defendants.

HANBURY v. HUGHES.

APRIL 15, 1890.] [DUBUC, J.

Agency—Sale—Estoppel.

Action brought on *trover* and common counts to recover from defendant the price of 999 M. brick. On July 13, 1889, the plaintiff thenceforward became, under an agreement with R. *et al*, the owner of a brickyard, all the brick, manufactured and unmanufactured, and entitled to the use of the plant for the balance of the season. R. *et al.* remained on the premises and worked as usual, but the men's wages were paid by plaintiff. R. *et al.* agreed with the defendant on September 19, 1860, to sell him 100 M. of brick out of said yard for $10 per M., the price to be applied in payment of the indebtedness of R. *et al.* to defendant. The delivery of the brick began immediately. While the delivery was going on, R. *et al.* informed the plaintiff of the sale and delivery, when the latter raised no objection, because, as he said, he was satisfied to take the defendant as payment. The defendant denied that he knew when he made the contract with R. *et al.* that the

plaintiff had control of the yard, and that he was the owner of the bricks. It was proven that the plaintiff met the defendant before complete delivery, and informed him that the yard was under his complete control, that he tried to get a letter from the defendant acknowledging liability to him for payment for all the bricks sold, but that the defendant refused to give it.

Held—

That the plaintiff could not recover the value of brick delivered before the defendant was informed by plaintiff that the yard, etc., was under his control, but that he was entitled to recover for all brick delivered after such information, following *Smith* v. *Grouette*, 2 M. R., 314.

Verdict accordingly.

Hagel, *Q. C.*, and *Coldwell*, for plaintiff.

Ewart, *Q. C.*, and *Coleman*, for defendant.

RYAN v. WHELAN.

APRIL 25, 1890.] [TAYLOR, C. J.

Real Property Act, 1889—Right of Province to tax and sell lands, the title of which is vested on Crown—Tax deed—Issue.

Issue under Real Property Act. The facts are, that on December 4, 1879, Dominion lands were sold to one A. W. Graham, who paid in full. Patent issued, erroneously to him, on April 8, 1881, and was corrected, by a new patent on September 27, 1881. In January, 1882, Graham conveyed to Casey, and on May 10, 1882, Casey gave a mortgage to plaintiff, under which she claims. The lands were sold by the Municipality of Lorne on March 12, 1883, and by various deeds, duly registered, the defendant became possessed of a title, under said tax deed on April 19, 1888. He entered into possession, broke 175 acres, and made improvements. The caveatee contends that there were no taxes due for 1880 and 1881; first, because at that time, the title to the land was in the Crown, and the

municipality had no power to tax lands, unless patented ; and second, because the proceedings taken by the municipality during these years were so irregular, that no tax was, even in fact, levied, or assessed upon the lands; also, that the proceedings, in connection with the advertising and selling, were so defective and irregular, that there was no sale, in a fair, open and proper manner.

Held—

1. That the defects complained of were cured by 49 Vic. cap. 52, sec. 673, as amended by 50 Vic., cap. 10, sec. 52 : " If there were taxes due and in arrear, upon the land at the time of sale, for which the same could be sold, by the municipality, I don't think the sale could be impeached."

2. That taxes could be imposed on the land in 1880 and 1881, though the legal title seems to have been in the Crown until September, 1881.

3. That, even before the passing of 46 and 47 Vic., cap. 1, sec. 271, lands purchased from the Crown were liable to taxation, before the issuing of the patent, and in default of payment could be sold, so as to transfer the interest of the holder, though leaving the rights of the Crown intact, and imposing on the Crown no obligation to recognize the purchaser at a tax sale.

4. That, by 47 Vic., cap. 11, sec. 338, which provided that all tax deeds should be questioned within one year from the date of deed, otherwise valid to all intents and purposes; and Sec. 340, which provided that all lands . . sold for which deeds have been given shall become absolutely vested, etc., that the lands in question were vested in the assignee of the tax purchase.

Verdict for defendant.

Munson, for plaintiff.

Mulock, Q. C., for defendant.

Re BIBBY.

APRIL 25, 1890.] [TAYLOR, C. J.

Certiorari—Conviction under Veterinary Act, 46 and 47 Vic., cap. 19 —Imposition of unwarranted costs by magistrate—Witness fees.

Rule for *certiorari* to bring up two convictions of a magistrate, for purpose of having same quashed. Convictions made on 1st June, 1889, by one of which, one Bibby was convicted of practicing as a veterinary surgeon, not being a person entitled to practice as such, under 46 and 47 Vic., c. 19; by the other, he was convicted of prescribing and administering medicine to animals, for hire or gain, or the hope of payment or reward.

Held—

(1) That the provisions of the Summary Convictions Act do not apply to these cases.

(2) That these were two distinct convictions under the Statute, and not a first and second conviction for the same offence; and in any event, that where defendant relies on the question being *res judicata*, the objection to the record and proceeding should be taken before the magistrate, following *Reg.* v. *Herrington*, 12 W. R., 420. *Vide* also, *Reg.* v. *Salop*, 2 E. and E., 386.

In pronouncing sentence, the magistrate imposed costs, $12.80 on the first, and $9.25 on the second conviction. It was contended that $9.75 and $7.50 of such costs were unwarranted, and that the convictions were therefore bad. The charge of $9.75 was made up of $7 witness fees, and $2.75 for constable for summoning witnesses. The charge of $7.50 was also for witnesses.

Held—

(1) That the charging of excessive costs is not a matter of form, but of substance, and, therefore, Sec. 148 of above Act, as amended by 49 Vic., Cap. 39, Sec. 33, which provides that no proceeding "shall be vacated, quashed or

set aside for want of form, or for any defect which does not substantially affect the justice of the case," does not apply. *Reg.* v. *Elliott*, 12 Ont., 531, followed.

(2) That the costs of witnesses, $7 in the one case and $7.50 in the other, were wholly unwarranted, these cases not coming within the provisions of Con. Stat, Cap. 51, Sec. 2, Sch. B., which only permits allowances to witnesses of attending before a justice of the peace, and for travelling expenses, in the cases of assault, trespass or misdemeanour, which these are not; that the convictions are therefore bad and should be quashed.

Rule for certiorari to quash convictions made absolute.

C. H. Campbell, for the defendant.

C. P. Wilson, for the prosecutor *Henderson.*

ROBERTSON v. WINNIPEG.

APRIL 26, 1890.] [BAIN, J.

Pleading distributively—Conflict of rules.

The plaintiff's declaration contained five counts. The first four were special, charging defendants with negligence and injury to his property. The fifth was a common count for money payable. The defendants pleaded one plea to the whole declaration, setting up special matters relieving them from liability. To this plea plaintiff demurred, on the ground that it did not answer and avoid the causes of action set forth in the declaration. On the argument the defendants contended that the special counts of the declaration were bad, as not disclosing any ground of action; that while the plea does not answer the common counts, and the plaintiff is entitled to judgment on the demurrer to the plea as to that count, yet defendants are entitled to judgment on their demurrer to the special counts. The plaintiff argued that the common counts were good, and he was entitled to judgment on the issue.

Question: Was the plea to be taken distributively and held good as applicable to counts to which it may be properly pleaded, and bad as to those to which it cannot be so pleaded, and judgment entered distributively, or was the plea bad altogether?

Held—

(1) That on a demurrer the court will consider the whole record and give judgment for the party who therein appears entitled to it; and it is an established rule, that upon the argument of a demurrer the court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective. *Chitty*, Vol. 2, p. 701.

(2) That a plea not answering the whole it professes to answer is bad *in toto*, whether it be pleaded to various facts in one count, or to various counts, or as a ground of defence for various persons, following *St. Germain* v. *Wilson*, 2 B. & C., p. 102.

(3) That Section 75, C. L. P. Act, 1852, providing that all pleadings capable of being construed distributively should be taken distributively, only applies to the findings of a jury on issues of fact, and made no change in the law before the enactment of the Act; following *Gabriel* v. *Dresser*, 15 C. B., 622; *Goldsmid* v. *Hampton*, 5 C. B., N. S., 104; *Chappel* v. *Davidson*, 18, C. B., 194; *Bullen & Leake*, III. Ed., pp. 823, 440; *Stephen on Pleading*, VII. Ed., p. 355; although the contrary was held in the Exchequer Court in *Blagrave* v. *Bristol*, 1 H. & N., 369, and also in Ontario in *Burrows* v. *DeBlaquiere*, 34 U. C. Q. B., 498.

Judgment for plaintiff.

Ewart, *Q. C.*, and *C. P. Wilson*, for plaintiff.

Howell, *Q. C.*, and *I. Campbell*, *Q. C.*, for defendants.

PRACTICE.

MANITOBA MORTGAGE CO. v. ROSENBLOOD.

FEBRUARY, 1890.] [DUBUC, J.

Notice of trial in ejectment.

In this case, the defendant gave notice of trial to the plaintiffs, for the Tuesday sittings of the court. Summons to set same aside, on the ground that notice of trial can only be given by the defendant for a Tuesday, where issue is joined, and that there being no joinder of issue on an ejectment suit under the Ejectment Act, notice of trial could not be given by him. The Referee dismissed the summons and the plaintiff appealed.

Held—

That a defendant could not give notice of trial for a Tuesday, in an ejectment suit.

Appeal allowed without costs.

Bradshaw, for plaintiffs.

Bonnar, for defendants.

BROWN v. MACLISE.

MARCH 8, 1890.] [THE REFEREE.

Exhibits—Filing and stamping same—Custody.

On summons for leave to sign final judgment, both attorneys filed affidavits in reply, in which exhibits were referred to, and marked, but not attached. The Referee refusing to allow the exhibits to be read without their being stamped and filed, this was done. The summons being disposed of, the attorneys applied for delivery of the

exhibits to them forthwith. This was at first refused, but subsequently

Held—

That the parties had a right to immediate delivery of the exhibits to them after disposal of the matter; following *Tebutt* v. *Ambler*, 1 Dowling, 674.

Exhibits delivered to attorneys.

Dodge, for plaintiff.

Baker, for defendant.

GRANT v. HUNTER.

MARCH 22, 1890.] [KILLAM, J.

The Real Property Act, 1889—Security for costs—Formal issue—Application for security for costs by caveatee—McCarthy v. Badgley, 6 M. R., 270 distinguished.

JUDGMENT—

"On reference to the Chief Justice, I find that he did not intend, in the case of *McCarthy* v. *Badgley*, 6 M. R. 270; to lay down an absolute general rule that every applicant for a certificate of title under The Real Property Act must necessarily be taken to occupy the position of a plaintiff towards the Caveator, in respect to any issue under a petition to enforce the caveat. It appears to me that this must depend upon the circumstances of each case, and the nature of the issue which it is found necessary to direct.

"In the present instance, while each party admits the original right of the patentee, each disputes the assignment or grant to the other. I am, therefore, of the opinion that the proper issue upon the main point will be, whether the caveator acquired by conveyance from the patentee an estate in fee simple absolute in the lands in question, as against the caveatee subject to such lien or charge (if any) as the caveatee may have for any rates or taxes, in respect

of such lands, paid by the caveatee. It appears to me that upon this issue, the verdict for either party, would leave wholly open the question of there being any such lien or charge, or of there having been any such payment. The latter question should be settled, if the caveatee desires to save a further issue as to whether 'The lands in question as between the caveator and caveatee are free from any liens or charge in favor of the caveatee for $——— (giving the amount claimed) claimed by the caveatee to have been by him paid for rates and taxes assessed and levied upon the land.' The verdict for caveator upon this would negative the existence of such a lien or charge.

"If it were found that such a lien or charge existed for a less amount than that named in the issue, the issue can be taken distributively and a verdict rendered for the caveatee for the less amount.

"The caveator having instituted proceedings by applying for a certificate of title, *thus claiming the land as against the world*, having reference to the question in dispute between the parties, must be taken as substantially in the position of a plaintiff towards the caveatee, and should give security for costs to the satisfaction of the Master, with the option of paying $200 into Court. Issues to be delivered by caveator within three days after notice of the completion of the security, and to be returned within three days. Issues to be tried before a judge sitting in Court on any Tuesday, upon the usual notice of trial by either party, and entry of record in usual time, subject to any further or other order altering or enlarging the time for trial."

Application granted; security to be given.

Bradshaw, for Applicant.

Howell, Q. C., for Caveatee.

IMPERIAL BANK v. ARMITAGE.

MARCH 24, 1890.] [THE REFEREE.

Filing papers attached to affidavits—Stamps.

Summons by defendant to set aside notice of trial. Several papers had been attached to affidavit on which summons was obtained. On return of summons, objection was taken that these papers, which formed part of the material, could not be read, as they had not been stamped, as was the affidavit to which they were attached.

Held—

That papers attached to affidavits must be stamped as any other paper filed, and that these papers, not being so stamped, could not be read.

Summons dismissed with costs.

Patterson, for plaintiff.

Haney, for defendant.

ROWAND v. MARTIN *et al.*

MARCH 26, 1890.] [KILLAM, J.

Practice—Filing affidavits in reply—Notice thereof.

The plaintiff filed a bill to set aside an award under the Railway Acts, which award was in favor of the defendants. The defendants took the necessary steps preparatory to the taxation of the costs of the award, and plaintiff applied for an injunction to restrain them. Fraud was the basis of the bill and plaintiff's solicitor filed an affidavit verifying the allegations of fraud generally, and examined one of the arbitrators under order 262 Eq. O. Defendants in reply filed affidavits of one of the arbitrators and his solicitor denying the allegations in the bill. Plaintiff then tendered affidavits in reply without filing same one day before the return of the motion or giving notice thereof.

It was objected, that the affidavits in reply should have been filed the day before the return of the motion, and that the affidavits were not strictly in reply but went to support the original material.

Held—

1. That the affidavits in reply, might be read on the return day of the motion.

2. That, following *Peacock* v. *Hopper* 7 Ch. D. 648; affidavits in reply might go to support the original material.

Kennedy, *Q. C.*, and *Culver*, *Q. C.*, for plaintiff.

Mathers, for defendant.

TODD v. EMPIRE BREWING CO'Y.

APRIL 1, 1890.] [DUBUC, J.

Exhibits—Examination—Production at trial.

On the trial of this case, counsel for plaintiff urged that all exhibits used on an examination held in the cause should have been filed with the examination returned to the court, and demanded their production. Opposed by defendants' counsel, who argued that the exhibits should not be filed with the examination; that the respective parties were entitled to the custody of their own exhibits, and that plaintiff should have given notice to produce.

Held—

That the exhibits should be attached to the Examination as part and parcel thereof, and be forthcoming on the day of the trial for the use of the parties. The question as to who was entitled to the custody of the exhibits, between the holding of the examination and the day of the trial, not discussed.

[NOTE. See *Evans* v. *Boyle*, 3 M. R., 243.]

Exhibits ordered to be produced.

Howell, *Q. C.*, and *Gilmour*, for plaintiff.

Perdue, and *Cameron*, for defendants.

BROWN v. SHANTZ.

APRIL 3, 1890.] [TAYLOR, C. J.

Security for costs—Residence out of jurisdiction—Domicile.

Application for security of costs. Bill filed alleging residence of plaintiff to be at Morden, in Manitoba. The affidavits in support of motion stated *inter alia*, that the plaintiff "left Manitoba in or about the month of "December last past, and is now residing, as I am inform-"ed and verily believe, in Oregon in the United States of "America, beyond the jurisdiction of this Honorable "Court." The plaintiff's attorney filed his own affidavit in reply, to the effect: "The above named plaintiff, is as I am "instructed by his brother, only temporarily absent from "the Province of Manitoba, and at the time of the filing "of the bill on the 31st December, the said plaintiff had "his domicile in the Province of Manitoba, and where it "still is, as I am informed as aforesaid, and verily believe, "and is not resident in the State of Oregon, but intends "to return to Manitoba, where he has considerable amount "of property, in the course of a few months, as soon as he "attends to his business, where he now is, as I am inform-"ed and verily believe."

On the above state of facts, the Referee ordered the plaintiff to give security. After a review of cases on the point, his judgment concludes as follows: "Here the "defendant's material seems to me to come within the "wording of the clause I have quoted from *Daniel* ('A "plaintiff cannot be compelled to give security for costs "unless he himself states in his bill that he is resident out "of the jurisdiction, or unless the fact is established by

" affidavits, etc.,') to be sufficient for the application. The " affidavit in reply admits that the plaintiff is without the " jurisdiction, but seeks to answer the application on the " ground that his absence is only temporary. As a matter " of evidence, this affidavit, made by the plaintiff's solici- " tor, alleging what has been told him, showing no means " of knowledge on the part of his informant, showing no " reason for the affidavit not being sworn by this brother " of the plaintiff, or of the plaintiff himself, is of very " slight value, and the defendant having shown himself " otherwise entitled to security, I am not inclined to refuse " the order on the evidence contained in the solicitor's " affidavit. The order will go." From this order the plaintiff appealed.

Held—

That the order was properly made, for the reasons above set out. The improper description of the plaintiff as " of Morden, etc.," instead of " as of Morden, etc., temporarily absent, etc.," commented upon.

Appeal dismissed. Costs to defendant, in any event.

Dodge, for plaintiff.

Hough, for defendant.

McMICKEN v. ONTARIO BANK.

APRIL 5, 1890.] [DUBUC, J.

Security for costs—Second application to increase same—Foreseen circumstances.

After a bill was filed, one defendant moved and obtained an order for security for costs. Usual order made. When the plaintiff was on the point of going to a hearing two of the defendants, one being he who had already moved, asked for additional security. It was objected that a second order could not be made on the Equity side.

Sec. 132, A. J. A. 1885, Eq. order 312 and *Simon* v. *Bank National*, 7 P. R. 422, cited.

The Referee made an order for increased security. The plaintiff appealed.

Held—

That further security will not be ordered unless circumstances have arisen, not foreseen at the date of first order, following *Haseltine* v. *Watkins*, 28 L. J. Ex. 40; *Foster* v. *Colby*, 27 L. J. Ex. 55.

Order reversed without costs.

Kennedy, Q. C., for plaintiff (applicant).

Bradshaw, for defendant.

FOREST v. GIBSON.

APRIL 10, 1890.] [THE PROTHONOTARY.

Security for costs—Mortgage to prothonotary—Valuation.

Usual order made for security for costs to satisfaction of Prothonotary. Plaintiff tendered a certificate of title under R. P. Act, with mortgage on lands therein described to Prothonotary.

Held—

That the production of a certificate of title under the R. P. Act, with a mortgage of lands described therein, to the Prothonotary for $400, securing costs to the extent of $200, was sufficient security, the valuation of the lands appearing in the application for certificate of title deemed to be a sufficient valuation.

Security allowed.

Baker, for plaintiff.

Bonnar, for defendant.

PORTAGE MILLING CO. v. GIBB.

APRIL 25, 1890.] [THE PROTHONOTARY.

Taxation—Costs of examination de bene esse not used at trial.

Plaintiffs' examined a witness *de bene esse.* The examination was not used at the trial, though the plaintiffs desired to use it, and had instructed the proper officer to transmit same to Portage la Prairie for trial, which through some mistake or misapprehension, had not been done. Plaintiffs secured a verdict at trial.

Held—

That the costs of the examination could not be allowed. Costs disallowed.

Patterson, for plaintiff.

Munson, for defendant.

N. W. TERRITORIES.

NORTHERN ALBERTA JUDICIAL DISTRICT.

BANNERMAN v. EMERSON, *et al.*

FEBRUARY 17, 1890.] [ROULEAU, J.

Interpleader Issue—Affidavit of bona fides in a bill of sale—Fraudulent preference.

by virtue of several *fi. fa's.* against A. C. S., who was the judgment debtor of the defendants, the sheriff seized several stacks of grain, which the plaintiff claimed under a bill of sale to him. The defendants contended that the bill of sale was void as against them, because the words "the creditors" were used in the affidavit of *bona fides* instead of "any creditors," as in Section 5, Cap. 47, Revised Ordinances N. W. T.

Held—

(1) That the words "the creditors" include "any creditors" or "either of them," and that they include the enactment of the ordinance (Sec. 5, Cap. 47, R. O.) and are sufficient thereunder; following *Fraser* v. *Bank of Toronto*, 19 U. C. R., 385; *Taylor* v. *Anslie*, 19 C. P., 84; and *Farlinger* v. *McDonald*, 45 U. C. Q. B., 233.

(2) That no *attesting* or *subscribing* witness is essential to the validity of a bill of sale, as the ordinance only requires such conveyance to be accompanied by an affidavit of witness thereto of the due execution thereof. (Cap. 47, R. O.)

(3) That the sale of a stack of grain of about 1,000 bushels by a farmer is a sale of goods made in the ordinary

course of trade or calling within the meaning of Sec. 2, Cap. 49, R. O.

Judgment for plaintiff.

McCarthy, Q. C., and *West*, for plaintiff.

E. P. Davis, for defendant.

In re the CAN. PAC. R'Y. CO. v. THE NATIONAL PARK SCHOOL DISTRICT, No. 102.

MARCH 17, 1890.] [ROULEAU, J.

School assessment—Validity of assessment made by assessor appointed previous year.

On an appeal by the Canadian Pacific Railway Comp'y from the assessment of their hotel at Banff, by the Trustees of the said School District, the following objections were taken to the assessment:

1st. That it was not an assessment for the fiscal year 1890, according to Section 183 of the School Ordinance of 1887.

2nd. That no assessor was appointed for 1890, assessment being made by assessor appointed in 1889, whose appointment lapsed on 31st of December of same year.

Held—

That the assessor should be appointed every year by the School Trustees; and as the fiscal year ends on the 21st December of every year; and as the assessor had been appointed in November, 1889; and as he made assesment only in January, 1889; the assessors had no jurisdiction to make such assessment, and therefore assessment was null and void.

Appeal allowed with costs.

P, McCarthy, Q. C., for Railway Co.

J. B. Smith, Q. C., for School District.

REGINA v. WILLIS.

APRIL 14, 1890.] [ROULEAU, J.

Maintenance of wife under R. S., c. 162, sec. 19—Competency of wife as witness to prove marriage.

W. was indicted for having unlawfully refused to provide necessary food and clothing for the prosecutrix, his wife, under sec. 19, cap. 162, R. S. C. The prosecutrix was tendered by the Crown as a competent witness, to prove marriage, under Sub-sec. 2 of said Sec. 19.

Held—

That wife, although a competent witness to prove the offence in other respects, is not a competent witness on her own behalf to prove the marriage.

J. R. Costigan, for Crown.

P. J. Nolan, for prisoner.

THE

WESTERN LAW TIMES.

NOTES OF RECENT DECISIONS.

MANITOBA.

PEARSON v. CANADIAN PACIFIC RAILWAY.

MAY 3, 1890.] [ARDAGH, Co. J.

County Court Jurisdiction.

The cause of action, both as to the contract and the breach thereof, arose in British Columbia, and the domicile of the plaintiff is in Winnipeg. The head office of the defendants is in Montreal, but they do business in Manitoba.

The plaintiff cited 49 Vic., Cap. 35, Sec. 32; 50 Vic., Cap. 9, Secs. 47 and 48; C. P. R. Charter; *Hamilton* v. *McDonald*, 2 Man. R., 259. On behalf of the defendant there were cited *Brown* v. *L. & N. W. R. Co.*, 4 B. and E., 326; *Shields* v. *Great Northern R. Co.*, 30 L. J., Q. B., 331; *Ralph* v. *G. W. R. Co.*, 14 L. J., N. S., 172; *Ahrens* v. *McGilligat*, 33 U. C. C. P., 171; *Westover* v. *Turner*, 26 U. C. C. P., 510.

Held—

(1) That in the absence of express terms granting jurisdiction under that head in the County Court Act, 1887, it will not be presumed that jurisdiction is conferred under

the provisions relating to procedure, wherein it is stated that a suit may be entered or tried in a court holden in the judicial division in which the cause of action arose or in which the defendant resides or carries on business.

(2) That even in connection with Sec. 47, County Courts Act, 1887, and 49 Vic., Cap. 35, Sec. 32, sub-sec. (*e*), which is also an Act relating to procedure, the court has no jurisdiction, and that said sub-sec (*e*) cannot be held applicable for the purpose of conferring a jurisdiction which does not already exist.

Order made dismissing action.

Cameron for plaintiff.

McLeod for defendant.

CAN. PAC. RY. CO. v. MUNC. OF CORNWALLIS.

MAY 5, 1890]. [BAIN, J.

Tax sale—Unpatented lands—Payment of money under duress—Right to recover same.

Action to recover monies paid under protest to the treasurer of the defendants—a municipality—on the last day for the redemption of lands sold for arrears of taxes. The lands had been sold by the plaintiffs under agreements in which default had been made by the purchasers and the same had been cancelled, and were prior to the 1st May, 1881, in the Northwest Territories, afterwards in the territory added to Manitoba.

It was contended by the plaintiffs that the lands were exempt under Section 16 of their contract with the Dominion Government, which provided "that the lands of the Company in the Northwest Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown," and also exempt as unpatented lands vested in the Crown. The patents issued in February, 1890. 44 Vic., Cap. 13, Sec. 9; 46 und 47 Vic., Cap. 1, Sec. 38, and 47 Vic., Cap.

11, Sec. 36, relating to the organization of the municipality, were referred to. The lands were assessed in the purchasers' names from 1882 to 1886 in four parcels. Tax sale at Brandon on March 10, 1887. Lands were redeemed in March, 1889, under written protest, and the Company's rights to sue for damages expressly reserved. Part of the taxes levied were for school purposes, and prior to the payment by the Company to the treasurer the same were paid over by him to the school trustees.

Query—Were these lands liable to be taxed or sold in view of the facts above set out, and that the legal title was vested in the Crown till 1890, although the plaintiffs had earned the land in 1886 under their contract?

Held—

(1) That even if the lands were not free from taxation under the contract, they belonged to the Crown and were exempt under Sec. 125, B. N. A. Act, and under provincial legislation.

(2) That where money paid illegally is paid with a full knowledge of all the circumstances, the party intending to give up his right, he cannot afterwards bring an action for money had and received ; but that it is otherwise when, at the time of paying the money, the party gives notice that he intends to resist the claim, and that he yields to it merely for the purpose of relieving himself from the inconvenience of having his goods sold ; following *Valpy* v. *Manley*, 1 C. B., 594 ; *Street* v. *Simcoe*, 12 U. C. C. P., 284, and 2 E. and A. C., 211 ; *Bolton* v. *York*, 2 U. C. Q. B., 21 ; see contra, *Sanborn* v. *Dickinson Co.*, 97 S. C., U. S., 181 ; *Railroad Co.* v. *Commissioner*, 98 S. C., U. S., 481.

(3) That the defendants were liable to repay the amount of the special school tax, county, and judicial tax, which were included in the amount paid by the plaintiffs, although the defendants were merely agents, and none of

the plaintiff's money had been paid over by the defendants. "It seems clearly settled that even if it had been received by the defendants and paid over they would still be liable on the ground that these taxes were also illegal; that defendants had no right to collect same; and the plaintiffs paid the money only to save the land, and not with the intention that it should be paid over." *Snowden* v *Davis*, 1 Taunt., 361; *Smith* v. *Sheep*, 12 M. and W., 584; *Parker* v. *Bristol Ry. Co.*, 6 Ex., 704.

(7) That an action for money had and received lies to recover back money which has been obtained through compulsion, even though it has been received by an agent who acted for his principal.

(5) That in view of the statutory enactments in force in this province, payments of taxes on the last day for redemption cannot be regarded as voluntary.

Verdict for plaintiffs in full.

Ewart, *Q. C.*, and *Tupper Q. C.*, for plaintiffs.
Howell, *Q. C.*, and *Henderson* for defendants.

MERCHANTS BANK v. MULVEY.

MAY 6, 1890.] [THE FULL COURT.

The defendant appealed from the finding of Hon. Mr. Justice Dubuc, herein reported *ante* p. 5, but the appeal was dismissed.

FONSECA v. SCHULTZ *et al.*

MAY 14, 1890.] [BAIN, J.

Demurrer—Redemption—Contribution.

Demurrer to the plaintiff's bill for want of equity. Bill alleges that lands in Winnipeg were patented to the defendant W. G. Fonseca, who held an undivided half-interest in trust for John C. Schultz; that in 1886, Fonseca and Schultz divided the same; that Fonseca at J. C. S.'s

request conveyed the latter's interest to the defendant Schultz's wife; that Fonseca conveyed his own portion to his wife, the plaintiff; that the lands were assessed and taxed by the city in 1883–4–5–6 and the lands were sold for arrears in June 27, 1887; that the defendant Schultz and one Bown (who it is alleged was only a trustee for the defendant Schultz) were the purchasers; that the defendant Schultz paid the amount of taxes due on the land; that they were also assessed in 1887 and 1888; that in June 27th, 1889, the plaintiff applied to redeem her own portion but that the treasurer refused to allow her to redeem part without redeeming the whole; that thereupon the plaintiff applied to the defendant Schultz to pay her proportion of the amount necessary to redeem, but she refused to pay it and directed the plaintiff to redeem the whole of the lands and that the plaintiff in order to save her lands, paid the amount demanded to redeem the defendants' share as well as her own, and that the defendants Schultz and Bown applied for and received the amount the plaintiff paid for redemption. The bill asks contribution and lien on the lands.

Held—

(1) That the general rule is that when the estate of two or more persons is subject to a common incumbrance, which one pays for the benefit of all, he is entitled to hold the whole estate, which he has thus redeemed, until the others pay their proportionate and equitable shares of the sum, so paid for the benefit of all; *Jones on Mortgages*, S. 1090 referred to.

(2) That the section only applies to cases, where the land sold was composed of more than one lot according to a registered plan, and the bill here expressly alleges that each parcel was sold separately, although it is provided in Sec. 638 of The Municipal Act 1886, that upon satisfactory proof, the treasurer may receive the proportionate amount

chargable upon sub-divided lands, which applies only in its terms to taxes and not redemption money. The learned judge commented on the fact, that in Ontario, on *Payne* v. *Goodyear*, U. C. Q. B. 448, the court held that a similar provision applied to redemption money, but he expressly held that because we have an express section 668, Sec. 638 must be so limited.

(3) That under Secs. 667 and 670, a stranger can redeem, and that the word "owner" will bear a wide construction. *McDougall* v. *McMillan* 25, U. C. C. P. 75.

Demurrer overruled with costs.

G. A. F. Andrews, for plaintiff.

Tupper, Q. C., for defendants.

REGINA v. JEWELL.

MAY 16, 1890.] [FULL COURT.

Evidence—Larceny in foreign state—Proof of, and evidence.

Crown Case reserved for opinion of Full Court. The prisoner was convicted at Spring Assize Winnipeg for having a grey mare in his possession which the jury found had been taken by him in North Dakota, under such circumstances that had it been so taken in Canada, the taking would have been larceny.

Prisoner's counsel took the objection that the Crown should have adduced affirmative evidence of the foreign law to show that the taking would have been larceny in Dakota, and quoted *Regina* v. *Allan*, cited in *Clarke's Crim. Law* p. 317 and *Taschereau's Crim. Acts* (2nd ed.) p. 458.

Crown counsel relied on Sec. 88, of the Larceny Act, R. S. C. Cap. 164, the wording of which differs from that of the New Brunswick Act, Rev. St. N. B. Cap. 15, Sec. 8, under which *Regina* v. *Allan* was decided; and also *Regina* v. *Hennessy*, 35 U. C. 603.

Held—

That, the jury having found the property brought into Canada by the prisoner, to have been taken by him in North Dakota, under circumstances which would have been larceny in Canada, that is all the statute required to be proved and the Crown was not bound to prove a felonious taking according to the laws of North Dakota; the conviction should stand. *Regina* v. *Hennessy*, above cited, approved of.

Hagel, Q. C., for the prisoner.

Davis, for the Crown.

Present—TAYLOR, C. J., DUBUC and KILLAM, J. J.

McLATCHIE v. McLEOD.

MAY 16, 1890.] [FULL COURT.

Homestead exemptions—occupation or cultivation by judgment debtor—effect of fi. fa.

Held.—That the fact of a judgment debtor living on the land in his father's house, as a member of his family, did not constitute a residence within the statute, as to enable him to claim an exemption; nor was the cultivation of the land by him, as his father's agent or servant, the cultivation of it by the defendant within the statute.

Action to recover possession of three parcels of land in Parish of Portage la Prairie. Special case stated by order of Mr. Justice Killam, with consent of parties, for the opinion of the Full Court, without pleadings.

The facts appear sufficiently from the judgment.

Judgment—TAYLOR, C. J.

"It may be, that before May, 1882, when the defendant [Roderick McLeod] conveyed the land in question to his father, John McLeod, and again from 6th Feb., 1888, when John McLeod reconveyed to the defendant, up to the present time, the benefit of the exemption clause in the Administration of Justice Act, 1885, Sec. 117, Sub-Sec.

8, might be claimed by the defendant as against an execution put in the sheriff's hands before May, 1882, or after Feb., 1888. But from the time when the defendant conveyed to John McLeod and until the reconveyance he could not on the facts stated, have set up a claim to the benefit of that Sub.-Sec., as occupying or cultivating the land as a homestead. John McLeod occupied the house on the land and the defendant when on the land at all, was merely living with him as a member of his family. As it is expressed in the case, "the defendant was at liberty to live with his father in the house upon the land so long as he liked, and when he did not like he could go." The cultivation of the land, when not lying untilled or under lease from John McLeod to McKenzie, by the defendant was merely as the agent or servant of John McLeod The case says "during the years 1883 and 1884 portions of the land were cultivated by John McLeod, who was assisted by the defendant," and again "during the year 1887 a portion of the land was cultivated in the interest of said John McLeod, the work being done by the defendant." That the defendant was living on the land in his father's house did not, in my opinion, make it his residence within the meaning of Sub.-sec. 8, nor was his cultivation of the land as the servant of his father, the cultivation of it by the defendant, within the meaning of that Sub.-section. The plaintiff's execution was put in the sheriff's hands in April, 1885, and at that time as has been established by the decree in the equity suit, which set aside the deed from the defendant to John McLeod as fraudulent and void against the plaintiff. The defendant had an interest in the land, was in fact except as against John McLeod, the owner of it. Then, when the execution was put in the sheriff's hands, the land and all the defendant's estate, right, title and interest therein, both legal and equitable, was, under the Administration of Justice Act,

1885, Sec. 108, bound by the execution, and he could not, at that time, have claimed the benefit of the exemption clause. That execution was kept duly renewed until on the 30th of June, 1888, the sheriff sold the land to the plaintiff, which sale was followed up by a conveyance from the sheriff on the 3rd July, 1889.

I have no doubt that the execution, having once bound the land, the sheriff could go on to sell under it even although the defendant should, in the interval between the putting of the writ in the sheriff's hands and the sale have made the lands his residence or be cultivating so that in the case of a writ placed in the sheriff's hands after that state of things existed he could claim the benefit of the exemption clause. Once bound, under such circumstances that the exemption could not be claimed, the land in my opinion, continued bound and the sheriff could go on and sell. There should be a judgment entered for the plaintiff with costs."

Ewart, Q. C., for plaintiff.

Cooper, for defendant.

Present—TAYLOR, C. J., DUBUC and KILLAM, J. J.

WILLIAMS v. THE MUNICIPALITY OF LOUISE.

MAY 19, 1890.] [ARDAGH, Co. J.

Quashing By-law—Local Option.

This was an application made by one Williams, under "The Municipal Act 1886," Sec. 327, to quash a local option by-law of the above municipality. It was a by-law intended to prevent the License Commissioners from receiving money for liquor licenses within the municipality, and the operative words of the by-law enacted that "the receiving by the Municipality of Louise of any money for a license is forbidden." A petition therefor, to the council was presented prior to January 16, 1890; and a copy of a notice, which was defective, purported to be given under

52 Vic., Cap. 15, Sec. 51, ss. (*c*)—The Liquor License Act —and was published in a local paper from that date until February 13, 1890, both inclusive.

There was no evidence that the clerk had made, or or posted up a proper voters' list, for 10 days prior to the election, as required under ss. (*i*). The voters' list from which the names of those who signed the petition were taken was that of 1888 and that voted on, was a list revised on February 13, 1890. Voting took place on February 27 last, and the by-law was read a third time on March 26, 1890.

The petition was not signed by 25 per cent. in number of the resident electors, whose names appear on the "last revised municipal list." There were numerous other irregularities.

The substantial objections taken by the applicant were as follows: 1. That the clerk did not prepare and make out, a list of those entitled to vote on such by-law, and post true copies of the same in his office and the nearest post-office. 2. That notice of such by-law was not published, as required. 3. That the petition therefor was not signed by 25 per cent of the resident voters. 4. That the by-law did not receive the assent of three-fifths of the votes. 5. That the voting was not taken according to the last revised voters' list. 6. That the by-law does not state the purposes of the license. The defendants objected that: 1. That there was no jurisdiction to hear the matter in Winnipeg and that there was no such body as the Council of the Rural Municipality of Rock Lake. 2. That the clauses in certain affidavits made by the applicant's solicitor on "information and belief" could not be read.

Held—

(1) That the hearing of the application may be had in Chambers by the judge in any portion of the territory covered by his commission.

(2) That a variance in the affidavits filed in support, entitled "The Council of the Rural Municipality etc.," instead of "The Rural Municipality, etc.," was not fatal.

(3) That the making of an affidavit, in any case, by an attorney or counsel engaged in the case, appears to be an objectionable proceeding, where the facts are equally within the knowledge of his client, or of a third party whose affidavit can be obtained, and statements in such affidavit made on information and belief, cannot of course be received in proof or disproof of the facts, either of the affirmative or negative, except where the information is confined to the knowledge of the party, whose proceedings are attacked.

(4) By-laws of this nature are to be construed strictly.

(5) That this by-law is void for uncertainty as it might be held to refer to a license for any purpose.

Order made as asked.

G. Davis, and *Wade*, for applicant.

Mulock, Q. C., for by-law.

HAFFIELD v. NUGENT, *et al.*

MAY 20, 1890.] [KILLAM, J.

Demurrer—Convict's Status.

A convict filed a bill, alleging that during the trial for murder when he was convicted of manslaughter, his solicitor received certain moneys unknown to the convict, and converted to his own use, the convict's goods. It alleges, too, that the convict after his conviction conveyed certain lands to the defendants "to hold the same as his trustees for the period of five years," assuring him "that by that time they would be able to secure his pardon." The conveyance of the lands was absolute, they were mortgaged, and the mortgagee was not made a party. The bill prayed that the accounts be taken, that the conveyance be declared null and void, or delivered up, or cancelled, or declared

that the defendants were trustees, or ordered to pay off the mortgage; with the usual formal prayers.

The question arose as to whether 33 and 34 Vic., Cap. 23, an Act which abolished forfeitures and escheats for treason and felony, and rendering the convict, while such, incapable of alienating or charging his property or of making any contract or agreement, and providing for the appointment of an administrator, was in force in this province. The demurrer alleged that it was, and that the convict had no personal status. An answer of two defendants as prepared denied the convict's statements *in toto.*

Held—

(1) That the bill was demurrable for multifariousness, there being no connection between the two transactions, although there was no demurrer on that ground.

(2) That prior to the statute cited, all the chattel property including *choses in action*, possessed by a felon when convicted, or thereafter acquired while still a convict, passed to the Crown; that under the Act in question the right to sue was vested in an administrator, and therefore in either case the convict had no *locus standi.* The law extended to the colonies. *Bullook* v. *Dodds*, 1 B. & A., 258; *Roberts* v. *Walker*, 1 Russ & M., 752; *In re Bateman's Trust*, L. R., 15 Eq., 335.

(3) That the statement that the plaintiff "is informed and believes" the deed to be absolute in form is not sufficiently positive that the deed does not set out the trust.

(4) That *no breach of trust is shewn*, and to say that the defendant has mortgaged the land is indefinite, and does not show that anything has been done inconsistent with the alleged trust. His Lordship refrained from expressing an opinion as to whether the Act was in force in this Province, in view of the fact that there were so many

fatal objections to the bill, and that it might be carried to the highest court in a different suit.

Demurrer allowed with costs. Amendment on the usual terms.

J. S. Ewart, Q. C., and *F. S. Nugent* for demurrer.

N. F. Hagel. Q. C., for plaintiff.

HOCKIN v. WHELLAMS.

MAY 22, 1890.] [DUBUC, J.

Homestead Exemptions—Retroactive Effect of.

Bill filed on a certificate of judgment for a sale of the defendant's lands. The facts are: A judgment was recovered by a firm of solicitors against the defendant in 1883, and a certificate was registered on October 19, 1889. The judgment was assigned to the plaintiff on November 19, 1889, and the bill was filed the next day. The land is in Rapid City, and is part of 160 acres which was subdivided into lots, about 40 acres of which was divided into five lots, and upon one of which the defendant's house and buildings were since 1879, occupied by him and his family. The defendant has been for the most of his time since 1886 in England as an immigration agent, but his family continued to reside on and cultivate the lands, which were entirely fenced. On October 1, 1889, the family, requiring hay for the stock, went to Newdale, 20 miles distant, for the winter. The defendant returned from England in November last, was annoyed at their action, with them returned in March last to the farm, and claimed exemptions.

Held—

(1) That except homestead exemptions, none of the other exemptions apply to debts or obligations undertaken before May 2, 1885. 49 Vic., Cap. 35, Sec. 1.

(2) That the amendment, 49 Vic., Cap. 35, Sec. 2,

applies absolutely to 48 Vic., Cap. 17, Sec. 117, Sub-sec. 8, and allows a man to claim exemption for his homestead, cultivated as a farm, even within the limits of a city or town.

(3) That the lands are exempt, because the defendant or his family have actually resided on the lands and cultivated yearly about 25 acres, which were fenced in as one plot, although it had previously been divided into town lots.

(3) That abandonment is a question of fact; there must be actual removal with no intention to return. If the removal is temporary, the *animus revertendi* is established, and third persons have not been led to believe it was not a homestead by the owner thus out of possession, and to act upon this belief in purchasing or specifically altering their condition upon the belief that it was not exempt as a homestead, the law would treat the homestead right as still subsisting. It was laid down very emphatically that to abandon a homestead a party must forsake and leave it with the intent never to return to it again as a homestead, which abandonment must be actual and not merely intentional. After having intended to abandon, he may change his mind. *Thompson on Homesteads*, Sec. 235; *Potts* v. *Davenport*, 79 Ill., 455; *Cipperly* v. *Rhodes*, 53 Ill., 346.

(5) That exemptions are not lost by making a mortgage on the property.

Bill dismissed with costs.

Howard for plaintiff.

Cameron for defendant.

PRACTICE.

RE WISHART v. BONNEAU.

JUNE, 1888.] [TAYLOR, C. J.

Charging order—Priority over a registered mortgage.

Petition under Imp. Act 23 and 24 Vic., c. 127, sec. 28, for a solicitor's charging order for unpaid costs. There was a mortgage duly registered, and by the solicitor's efforts the property was preserved. The question arose: Could an order be made giving the solicitors' priority for their costs over the mortgage, and allowing them to dispose of the land to satisfy such costs?

The following cases were cited:

Young v. *English*, 7 Beav. 10; *Grey* v. *Mathews*, 3 Ir. Eq. 530; *Kelly* v. *Kelly*, 1 Ir. Eq. 317; *Faithful* v. *Ewen*, 7 Ch. D. 495; *Bulley* v. *Bulley*, 8 Ch. D. 479; *Greer* v. *Young*, 24 Ch. D. 545; *Charlton* v. *Charlton*, 52 L. J. Ch. 971; *Jackson* v. *Smith*, 53 L. J. C. 972; *Ex parte Adams*, 14 Q. B. D. 543; *Shevlin* v. *McGrave*, 17 L. R. I. 271; *Bailey* v. *Burchall*, 2 Hem. and M. 371.

Held—

That the solicitors were entitled to a charging order, with liberty to apply as to any thing further, in the way of rendering the order available; following *Jackson* v. *Smith*, above cited.

Order made accordingly.

G. G. Mills, and *G. A. Elliott*, for applicants.

C. P. Wilson, for mortgagee.

REGINA v. STARKEY.

MAY 9, 1890.] [TAYLOR, C. J.

Certiorari—Want of jurisdiction—Practice.

Motion, on six days notice to the convicting justices, for *certiorari* to remove conviction for selling liquor without

a license, and to quash such conviction on the ground of want of jurisdiction. On return of motion, a verified copy of the proceedings before the justices, the notice, and affidavit of service thereof, were put in, in support. Counsel for the magistrates took the preliminary objections that there was no affidavit showing want of jurisdiction ; that the motion must be based on an affidavit ; and that the material on which the motion was based should have been filed before the six days notice was given. Counsel for defendant referred to *Queen* v. *Hodgins*, 12 W. R., 90, as to filing affidavits.

Held—

That the above objections are not tenable.

Cassidy, for defendant.

Mulock, *Q. C.*, for magistrates.

REGINA v. STARKEY.

MAY, 15, 1890.] [KILLAM, J.

Certiorari—Practice.

The defendant again moved for a *certiorari*. Counsel for prosecutor filed an affidavit, that the defendant had given notice of appeal to the County Judge, under Liquor License Act 1889, Sec. 126; that security for such appeal had been given; whereupon the justices, under Sub-sec. *b.*, had transmitted the conviction and proceedings before them, to the County Court Clerk for the appellate Judge. Defendant replied that the County Judge had received the conviction, but on being notified that the defendant had elected to proceed by *certiorari*, had returned the conviction, etc., to the justices, and that no further proceedings on the appeal had been taken.

It was objected, that the County Judge was the legal custodian of the conviction, etc., though the justices may have physical possession of it, and that the *certiorari* should

not issue to the justices, as asked by the motion, but should issue to the County Judge, if at all. This was rebutted by the defendant.

Held—

(1) That after the return of the justices to the "sessions" the power of amendment was taken from the convicting justices; following *Regina* v. *Smith*, 35 U. C. Q. B. 518; *Gude's Crown Practice*, Vol. 1, p. 221.

(2) That the conviction and other proceedings passed, wholly out of the custody, or power of the convicting justices, upon their transmission to the clerk of the county court, and the papers were improperly sent back to them by the clerk. They now form records of the appellate court and cannot properly be returned under writ of *certiorari* by the convicting magistrates, notwithstanding their temporary possession of them, and should be retransmitted at once to the clerk of the county court; commenting upon *Rex* v. *The Inhabitants of Warminster*, 1 Str., 470; *Queen* v. *Caswell*, 33 U. C. Q. B. 303.

(3) That the *certiorari* should be directed to the County Judge, but the statutory six days notice was not required to be given to him, and the notice to the justices could not be dispensed with until some order had been made by the judge. *Query*—Whether the Judge comes within 13 Geo. II., Cap. 18, Sec. 5.

(4) That if an application for a *certiorari* directed to the Judge be issued, the justices should have notice thereof and present notice could not be amended.

Motion refused without costs.

Cassidy, for defendant.

Mulock, *Q. C.*, for justices.

N. W. TERRITORIES.

NORTHERN ALBERTA JUDICIAL DISTRICT.

EMERSON *et al.* v. SPARROW *et al.*

APRIL 15, 1890.] [ROULEAU, J.

Separate property of married woman in the Territories—Effect of sale of her separate estate.

Action by creditors to set aside alleged conveyance from husband to wife, or have latter declared a trustee. The facts are: In January, 1884, the defendant, H. A. S., the wife of A. C. S., the other defendant, purchased certain lands from C. N. L. Co. for $350, payable in three payments. H. A. S. paid the first two out of moneys given by A. C. S., and saved in household expenses. The last payment was borrowed from her brother. In 1886, she sold the property for $5,000, and invested the proceeds in other properties. Her husband was solvent in 1884, but insolvent in 1886, at the time of the second sale. The question was asked: Did the $5,000 revert to her husband, and also all investments of same money made by her in any other property?

Held—

1. That in equity, a married woman can hold property apart from her husband, and that upon her once being permitted to hold property to her separate use as a *feme sole*, she took and takes it with all its privileges and incidents, including the *jus disponendi* following the rule as laid down in *Snell's Eq.*, 434; *Fettyplace* v. *Georges*, 1 Vesey Jr. 46; *Rich* v. *Cockell*, 9 Ves. 369; *Wagstaff* v. *Smith*, 9 Ves. 520; *Thackwell* v. *Gardiner*, 5 DeG. and S., 58; *Hodgson* v. *Hodgson*, 2 Keen 704.

2. That she may, since 43 Vic., c. 25, s. 57 (N. W. T.) which was an Act allowing her to deal with real estate as a *feme sole*, hold real property, but that if she converts it into personal property the latter can be seized for the debts of the husband under Sec. 36 of N. W. T. Act; *Brittlebank* v. *Gray-Jones*, 5 Man. R. 33, but that the sale of real estate for money and the immediate investment of same in real estate, did not convert it into personal property whose possession was in the hands of her husband, A. C. S., and that if she had bought personal property—(cattle, etc,.)—the latter would have become the property of the husband.

3. That if a married woman sells her separate estate, converts it into money and invests the same in personal property, then it becomes her husband's, and not otherwise.

Plaintiff's action dismissed with costs.

E. P. Davis, for plaintiffs.

McCarthy, Q. C., and *Lafferty*, for defendant, H. A. S.

Beck, and *Nolan*, for defendant, A. C. S.

SASKATCHEWAN JUDICIAL DISTRICT.

HUTCHINSON v. MAIR.

APRIL 26, 1890.] [MCGUIRE, J.

Practice—Costs—Where each party succeeds in part.

Action on a mortgage due 31st Oct., 1886, without interest, claiming $100 principal and three years interest from due date. Counter-claim for use and occupation of other lands at $25 per annum for three years. Reply :—That the plaintiff and one T. H., entered upon land under parol agreement to purchase, the payment secured by the

mortgage being part payment on the land. Defendant afterwards repudiated the agreement.

Judgment—

In this case I find as follows :—

1. That the plaintiff is entitled to succeed as to the item of $100, balance of mortgage money.

2. That he is entitled to interest by way of damages on $75 from the time when the proposed purchase negotiations fell through, in the spring of 1889, and I allow him as such damages $9.00.

3. That the plaintiff is not entitled to interest or damages pending the negotiations.

As to counter-claim :—

4. That defendant is entitled to the first item of counter-claim, $25. I find this mainly on the evidence of T. H.

5. I do not allow any interest or damages on that item, because it does not come within 3 and 4, W. IV, c 42, s 28, "the time of payment not being fixed by writing nor demanded in writing, etc.," but I deduct the $25 from the $100.00 in computing damages allowable to plaintiff.

6. I do not find in favour of defendant in the other items of counter-claim, because :

1. As to the hay in 1887 and 1888, the plaintiff occupied as a purchaser and there was no promise proved to pay for same, as there was in 1886. This is consonant with natural justice, as well as law, for defendant had the use of plaintiff's money without interest during that time.

2. As to the use of the use of the cultivated 6 or 8 acres, that were on the east half of the quarter section, and [though] that east half was bought by Frank Hutchinson in spring of 1887, although deed was not given till 1888, he was practically owner, having paid the whole price in spring of 1887.

I find verdict in favor of plaintiff, for the difference between $189 and $25,–$84

I allow plaintiff his costs as to his claim, and I allow defendant his costs against plaintiff as to his counter-claim, subject in both cases to this modification: that since neither party is fully entitled to costs on the Reply and Rejoinder respectively, having partly failed and partly succeeded therein, I think that as to these two pleadings the costs of one party should set off and balance the costs of the other party. I direct the clerk to tax to plaintiff's advocate a counsel fee of $10.00 and to defendant's advocate a fee of $10.00 as to the counter-claim. Let judgment be entered in fifteen days from to-day.

Judgment accordingly.

Newlands, for plaintiff.

Maclise, for defendant.

NORTHERN ALBERTA JUDICIAL DISTRICT.

LOUGHEED *et al.* v. PRAED *et al.*

MAY 5, 1890.] [ROULEAU, J.

Issue of Interrogatories in the Territories for discovery—Effect of English Judicature Act.

The plaintiffs obtained an *ex parte* order for, and served interrogatories on the defendants. The defendants took out a summons, to set aside the order on the ground that there was no jurisdiction to issue interrogatories for discovery under the Territories Judicature Ordinance, on the ground that the Territories Judicature Ordinance, introduced only so much of Eng. Order XXXI, as to discovery as dealt with discovery and inspection of documents, and expressly and intentionally, omitted all provision for discovery by interrogatories and therefore the English practice

was not intended to be introduced under Sec. 479 of the Ordinance.

Held—

That English Order XXXI deals with two distinct kinds of discovery, discovery by interrogatories, and discovery by production and inspection of documents, that as to the first kind of discovery, no provision whatever is made in the Territories Judicature Ordinance and therefore the English practice in respect to that is introduced by Sec. 479 of the Ordinance which is as follows: "When "no other provision is made by this Ordinance, the pro-"cedure and practice existing in England, on the first day "of January, A.D. 1885, shall (adapted to the circum-"stances of the Territories) be held to be incorporated as "part of this Ordinance."

Summons dismissed.

Tupper, Q. *C.*, and *Smith*, *Q. C.*, in support of summons.

Beck, contra.

THE

WESTERN LAW TIMES.

NOTES OF RECENT DECISIONS.

MANITOBA.

HANBURY v. HUGHES.

JUNE 7, 1890.] [FULL COURT.

The defendant appealed to the full court against the verdict entered herein, ante p. 29, but the verdict was reduced on questions of fact to $40.

MORDEN v. SOUTH DUFFERIN MUNICIPALITY.

JUNE 7, 1890.] [FULL COURT.

Taxes—Interest—Unconstitutional imposition.

This was a case stated for the opinion of the court, by the consent of the parties. The question substantially was: Is the imposition of a penalty upon taxes in arrear valid, by a municipality under a statute providing "that the sum of ten per cent. on the original amount shall be added on all taxes then remaining unpaid, in towns and municipalities," "and in cities a rate of ¾ per cent. at the end of each month shall be added upon overdue taxes" from a certain date, or under a statute providing that "all parties

paying" before a certain date, shall be entitled to a reduction of ten per cent. on the same, the said penalty being held to be in the nature of damages, hence interest, and thereby conflicting with the Dominion Parliament's power relating to "interest."

Held—

1. That it is not within the power of the Local Legislature, to impose, as it had done by that section, a rate of interest, where there is no contract, in excess of what has been fixed by the Dominion Parliament, and that it is not within the power of the Local Legislature to impose the increase or penalty provided for by sec. 626. *Per Taylor, C. J.*, following *Schultz* v. *Winnipeg*, 6 Man. R. 35.

2. That the giving a rebate for prompt payment does not seem open to objection, although the provision for that is contained in the same section, as that which provides for the increase (and the latter part) is an entirely distinct one and may, I think, stand, although the other part fails. *Per Taylor*, C. J.

3. That the addition authorized is not interest accruing *de die in diem*, at the rate of ten per cent. per annum, but the word "interest" as used in "The Act respecting Interest," R. S. C. chap. 127, would naturally mean interest in the usual sense of the term accruing *de die in diem*, and proportioned directly to the time during which the principal remains overdue. *Per Killam*, J.

4. "That chap. 127 is an enabling statute, not a dis-
"abling one, and does not prohibit the imposition of any
"rate higher than six per cent. per annum, and the Pro-
"vincial Statute is in no respect inconsistent with it.
"Chap. 127 fixes six per cent. as the rate only, when in-
"terest is payable by agreement, or by law, and no rate is
"fixed by agreement, or by law. It does not make inter-
"est payable where not otherwise payable, by agreement,
"or by law. The decision, in *Schultz* v. *Winnipeg*, pro-

" ceeded upon the view that the Provincial Legislature " could not authorize the addition, because, in doing so, it " was legislating in relation to a matter coming within the " class of subjects denominated 'Interest,' in The British " North America Act, sec. 91, sub-sec. 19, not because its " legislation was inconsistent with a law of Canada pro- " hibiting payment of interest, or a rate of interest greater " than six per cent. per annum. There would then be no " interest payable, either by agreement, or by law, and the " Dominion Act could have no application." *Per Killam*, J.

5. " Although the provision for a discount may seem " to be an indirect method for accomplishing the same end, " as that authorizing the additional rate in respect of over- " due taxes, and thus to be trenching upon the subject of " 'Interest,' yet there is this distinction that for an addi- " tion the authority of the Legislature is necessary, but " that in respect of the discount there is a qualification of " the provisions, authorizing the imposition of a general " rate, such that there is an absence of authority to charge " more than the reduced amount before a certain date." *Per Killam*, J.

6. If the provision of the statute imposing the addition of ten per cent. is invalid, then there is nothing in the Act that justifies the imposition of six per cent. or any other rate. *Per Bain*, J.

Judgment for plaintiff.

Hough, for plaintiff.

Hon. Attorney-General and *C. P. Wilson*, for defendants.

Present—TAYLOR, C. J., KILLAM, and BAIN, JJ.

STEPHENS v. McARTHUR.

JUNE 7, 1890.] [FULL COURT.

Assignment for the Benefit of creditors—Interpleader—What constitutes a preference.

The facts in this case are sufficiently set out ante p. 19 (May No.). The statute in question, 49 Vic., cap. 35, sec. 2, M., is similar to R. S. O., cap. 124, "An Act respecting Assignments and Preferences by Insolvent Persons." Cap. 49, Revised Ordinances N. W. T., contains a similar provision to the one in question. It does not appear that the assignment referred to, was made under the Act.

Held—TAYLOR, C. J.

1. That the clauses in question are *intra vires*, dealing with "property and civil rights." Difference of opinion in *Edgar* v. *Central Bank*, commented upon and held that it is best to lean to that construction in a provincial court which will sustain the enactment as *intra vires*.

2. That sec. 7 of cap. 124 and cap. 45 of Acts cited, relating to the exclusive right of an assignee to sue, only applies to assignments under the Act. *Robertson* v. *Holland*, 16 Ont. R. 532 followed, "To hold that in no case now can the right to impeach fraudulent transactions be exercised by a creditor, would involve the result, that no matter how many transactions there may be, void under sec. 2; so long as the debtor makes no assignment under the Act, creditors defeated, delayed or prejudiced by this, must be wholly without a remedy." *Dominion Bank* v. *Curran*, 14 Ont. R. 465; *Goulding* v. *Deeming*, 15 Ont. R. 201; *Johnson* v. *Cline*, 16 Ont. R. 129; *Edgar* v. *Central Bank*, 15 A. R. 193; *Kennedy* v. *Freeman*, Id. 216; *Clarkson* v. *Sterling*, Id. 234; *Molson* v. *Halter*, 16 A. R. 329.

3. That sec. 7 refers to the recission of agreements, etc., and this is not a suit for the recission of any deed or

instrument, but all that the defendants seeks, is to have the chattel mortgage declared fraudulent and void against them, and even if they succeed, the instrument stands in full force and effect as between the parties to it.

4. That a conveyance which has the effect of delaying or defeating creditors, or of preferring one creditor to another is void equally with one executed with the intent to do so :

It was held that some effect must be given to the words "or which has such effect" in sec. 2, after referring to *Johnson* v. *Hope*, 25 U. C. L. J. 86 ; *Lamb* v. *Young*, 26 U. C. L. J.—both of which cases apparently hold that *intent* is material—to the dissenting judgment of *Gwynne*, J., in the Supreme Ct. in *Kloeffer* v. *Warnock* and *Molson's Bank* v. *Halter*, 16 Ont. Ap. R. 323.

Held—KILLAM, J.

1. That *Fish* v. *Higgins*, 2 Man. R. 65, is not in any way affected by *Bathgate* v. *The Merchant's Bank*, 5 Man. R. 210. See judgment of Bain, J., ante p. 18.

2. That sec. 2 of the Acts cited is not limited by sec. 7 to the case of an assignment made under the Act, and to a suit by the assignee to rescind the gift, etc.

3. That under sec. 2 as under 13 Eliz., cap. 5, sec 1, and secs. 122 and 123 of The A. J. A. Act, 1885—48 Vic., cap. 17 M.—certain gifts, etc., are made absolutely void as against creditors, and being void by force of the statutes, they can support no title as against the sheriff acting under an execution at the suit of a creditor. Neither the sheriff, nor an execution creditor is obliged to bring any suit or take any steps to have them rescinded. *McMillan* v. *Bartlett*, 2 Man. R. 374.

4. That unless sec. 7 is interpreted as above, it would prevent any creditor from having the benefit of 49 Vic., cap. 45, sec. 2 M., of The A. J. A. Act 1885, sec. 122, or of 13 Eliz., cap. 5, unless the debtor should choose to make

an assignment for the benefit of his creditors, and the debtor would thus be enabled at his own pleasure to frustrate the provisions of each of those enactments.

5. That it is impossible for the Dominion Government to legislate on the subject of Bankruptcy and Insolvency without affecting civil rights, and it has impliedly the right to so affect them by legislation coming properly under the head of the former subject. *Cushing* v. *Dupany*, 5 Ap. C. 409; *L'Union St. Jacques de Montreal* v. *Belisle*, L. R. 6, P. C. 31; *Shears* v. *Rogers*, 3 B. and Ad. 369; *The Citizen's Insurance Co.* v. *Parsons*, 45 L. T. N. S. 721; *Valin* v. *Langlois*, 3 S. C. R. 1, were referred to.

"It appears to me that the Legislature intended to "escape from the refinements of the courts, upon the question of intent and to establish a more definite criterion of "the validity of the transaction. I quite agree to this "extent with the view of Mr. Justice Gwynne, that it is "the 'effect' at the time of the transfer which is to be "considered and not an effect produced in part by subsequent events. But I cannot agree that it is proper to "consider how far either party to the transaction appreciated or intended the effect or had knowledge of the facts "from which the effect might be estimated."

Appeal dismissed with costs.

Howell, Q. C., and *Wade*, for appellants.

Crawford and *Elliott*, for execution creditor.

Present—TAYLOR, C. J., DUBUC and KILLAM, JJ.

MILLER v. MANITOBA LUMBER CO.

JUNE 7, 1890.] [FULL COURT.

Corporation—Liability for acts of manager in false imprisonment.

Action for false imprisonment and malicious prosecution. A bookkeeper of a company under the directions, as the jury found, of the manager, swore out an information upon which the plaintiff was arrested. The manager

acted without specific instructions, but ordered the information in the ordinary course of his duties. No express authority to arrest or prosecute was given in the by-laws. The plaintiff sued the company for the manager's action.

Held—

1. That where a case is tried by a jury and a non-suit is moved for at the trial but over-ruled, and leave is not reserved, the court cannot enter a verdict for the defendants.

2. That it is not sufficient to describe a man as "manager" or by the name of his office (to bind the company), but the plaintiff must prove either express authority to institute the proceedings complained of, or the nature of the office and the powers and duties of the officer who instituted them, for the purpose of enabling the court or jury to draw the necessary inferences to show that he had implied authority. *Per Killam*, J., citing *McSorley* v. *St. John*, 6 S. C. R. 532; *Bank of New South Wales* v. *Owston*, 4 Ap. Ca. 270; *Lyden* v. *McGee*, 16 Ont. R. 105.

3. That the mere appointment as a general solicitor of a company would not warrant his instituting or conducting on behalf of the company, prosecutions upon charges of criminal conduct without further authority or instructions.

4. That laying all the facts of a case fully and fairly before counsel and acting *bona fide* upon the opinion—however erroneous it may be—will be evidence to prove probable cause. *Per Dubuc*, J., citing *Fellows* v. *Hutchinson*, 12 U. C. Q. B. 633, but where it also appears that the party was influenced by an indirect motive, such as the saving of the trouble and expenses of a civil suit, such is properly left to the jury. *Ravenga* v. *McIntosh*, 2 B. and C. 693; 4 D. and R. 107; *Hewlett* v. *Crutchley*, 5 Taunt. 277.

5. That where the damages given are excessive, but the plaintiff is entitled to substantial damages, the court

has power to refuse a new trial without the consent of the defendant, on the plaintiff's consenting to the amount of the damages being reduced to a reasonable amount. *Bell* v. *Lawes*, 12 Q. B. D. 356; *Massey* v. *Toronto Printing Co.*, 11 Ont. R. 362.

Verdict set aside and new trial granted.

Hagel, Q. C., and *Howden*, for plaintiff.

Tupper, Q. C., and *Phippen*, for defendants.

Present—TAYLOR, C. J., DUBUC and KILLAM, J J.

RE TAIT.

JUNE 12, 1890.] [DUBUC, J.

Real Property Act—Primogeniture.

The law of primogeniture was not in force in this Province prior to the transfer.

The District Registrar submitted a case for the opinion of the Court under secs. 119 and 120, Real Property Act 1889. It was asked "Was the law of primogeniture in "force in the Province of Manitoba between July 15, 1870, "and May 3, 1871?" The latter date is that of the passing of The Intestacy Act, 34 Vic., cap. 6, s 1, M. The facts are sufficiently set out in the copy of judgment hereinafter given.

Judgment—

In this application, under The Real Property Act, the question raised is whether the law of primogeniture, as it exists in England, was in force here before the passing of the Intestacy Act by the Provincial Legislature in May, 1871.

John Tait was at the time of the transfer, 15 July, 1870, owner in fee of lot 43 of the Parish of St. James. He died intestate in April, 1871, leaving a widow and five children. James Rickard Tait, the eldest son, claims the whole of the land, as the heir at law of his father, and the patent issued to him on that ground. The law of primo-

geniture in England arose out of the feudal system established by William the Conqueror. Under the old Saxon rule, the inheritance was divided equally amongst all males of the same degree, and that rule prevailed as to all lands, not actually the subject of feudal tenure until the fore part of the thirteenth century, when under Henry III, the feudal law introduced by the Normans, of descent to the eldest son, or eldest brother, was established. *Stephen's Commentaries on the Laws of England*, Vol. I, 404; *Broom and Hadley's Commentaries*, Vol. II., 383 ; *Williams on Real Property*, 99.

That law has been the general law of England up to the present time. But in the County of Kent and some other places, the ancient tenure of gavelkind, or socage tenure, by which the descent of the estate is, not to the eldest son, but to all the sons in equal shares, has always prevailed.

Now was that law of primogeniture established here when the country was taken possession of in the name of the British Sovereign. In *Blankard* v. *Galdy*, 2 Salk. 411 ; it was held that where an uninhabitated country is found out, and planted by English subjects, all laws in force in England, are immediately in force there, but in the case of an inhabited country, conquered, not till declared so by the conqueror. The same doctrine was followed in 2 P. Will. 75; where it is said: "If there be a new and uninhabited country found out by English subjects, as the law is the birthright of English subjects; so wherever they go they carry their law with them and therefore such new found country is to be governed by the laws of England."

It has been contended that the law of primogeniture was part of the feudal system, and as that system was not introduced into this country, that feature of the feudal tenure was no part of our laws. I think, however, that the law of primogeniture though it grew out of the feudal

system, was not an essential part thereof, and as it prevails generally in England even in regard to the estates held in tenure, quite different from the feudal tenure, I am not prepared to say that from the fact that the feudal laws and feudal customs were not imported into this country, it should be held conclusively, that the law of primogeniture was not introduced as part of our law.

But another point remains to be considered in regard to the law respecting the descent of land in this country. In the charter of the Hudson's Bay Company, the lands to which the said charter is to apply are described as: "All "the lands and territories upon the countries, coasts, and "confines of the seas, bays, lakes, rivers, creeks and "sounds, aforesaid '(stated in the preceeding part, to be "those which lie within the entrance of the Straits com-"monly called Hudson's Straits, in whatsoever lati-"tude such bays, etc., should be)' that are not already "actually possessed by or granted to any of our subjects "or possessed by the subjects of any other Christian Prince "or State, with the fishing of all sorts of fish, etc., * * "* * * and that the said lands shall be from hence-"forth reckoned and reputed, as one of our plantations or "colonies in America, called Rupert's Land: And further "We do by these presents, for Us Our Heirs and Succes-"sors, make, create, and constitute the said Governor and "Company for the time being, and their Successors the "True and Absolute Lords and proprietors of the same "territory, limits, and places aforesaid, and of all other "the premises hereby granted as aforesaid, with their, "and every of their rights, members, jurisdictions, pre-"rogatives, royalties and appurtances whatsoever, to them "the said Governor and Company and their Successors "forever to be holden of Us, Our Heirs and Successors as "of Our Manor of Greenwich, in our County of Kent in "free and common socage."

If the Governor and Company of Hudson's Bay are constituted the lords and proprietors of the said lands, and if the said lands are to be held by them as in the County of Kent, where the law of primogeniture does not prevail, does it not follow that the law of primogeniture was never introduced into this county? I think so, otherwise why should such restriction be found in the charter?

As this was the only question submitted to me in this application, I refrain from deciding any other point which might be raised in connection therewith.

Question submitted, answered in the negative.

Campbell, for the transferee of the eldest son.

C. P. Wilson, for the Attorney-General.

RIPSTEIN v. BR. C. LOAN Co.

JUNE 14, 1890.] [KILLAM, J.

Interpleader issue—Married woman's property.

Interpleader issue. Certain goods comprising a stock-in-trade, were seized by sheriff under an execution issued against the plaintiff in a shop in which the wife of the execution debtor was carrying on business. The wife of the latter claimed the goods and the sheriff interpleaded. She alleged that at the time of her marriage, she was possessed of a sum of money, acquired from her father's estate, with a portion of which after her marriage, she purchased from her husband's brother a stock of goods with which the brother was carrying on business at the same shop and that she has ever since carried on the business as her separate business, purchasing goods with her own separate moneys or credit.

Held—

1. That the burden of proving the ownership is upon the plaintiff (the wife). *Richards* v. *Jenkins*, 18 Q. B., D.

451; *Usher* v. *Martin*, 24 Q. B., D. 270; *Harrison* v. *Douglas*, 40 U. C. Q. B. 410.

2. That it is not sufficient to support the wife's claim and to throw the *onus probandi* on the defendant, that she should simply swear that the goods seized were hers but she must make out her right by very clear evidence.

3. That the uncorroborated evidence of the wife respecting her possession of independent means could not be accepted, in view of her unsatisfactory statement as to the position of the property and division thereof from which she purported to get the means, following *Meakin* v. *Sampson*, 28 U. C. C. P. 355; *Levine* v. *Claflin*, 31 U. C. C. P. 600; *Harrison* v. *Douglas*, 40 U. C. Q. B. 410; *Murray* v. *McCallum*, 8 Ont. A. R. 277.

4. That the statute relating to married woman does not protect a joint trading, or what would in the case of persons not husband and wife be a joint trading, *Levine* v. *Claflin*, *supra*.

Verdict for defendant.

Hagel, Q. C., and *Howden*, for claimant.

Howell, Q. C., and *Haggart*, for defendants.

GOWANS, *et al.* v. CHEVRIER *et al.*

JUNE 17, 1890.] [DUBUC, J.

Indicia of fraud.

Bill to set aside a judgment as fraudulent. The judgment was recovered upon notes amounting to $3,850, given for accommodation loans between merchants. The absence of books, entries of accounts, destruction of paid notes, no entries of the receipt of same in judgment debtors books, while other similar transactions with a firm of which the defendant was a member, and the carrying of large sums of money in his pocket, and handing them to the defendant instead of giving cheques on banks, when he had two

separate accounts, were commented upon. The judgment debtor ran away when an order to examine was issued, left the country, and refused to testify in the U. S.

Held—

Citing with approval, that anything out of the usual course of business is a sign of fraud, the omission of the grantee to testify or to produce the debtor or any other important witness, or any important paper is a ground for an unfavorable presumption, and frequently exercises an important influence upon the final determination of the questions of fraud ; such also is the ante-dating of an instrument. *Bump on F. Conveyances*, pp. 44, 51, 54. *Kerr*, p. 384; *Douglass* v. *Ward*, 11 Grant 44; *Ball* v. *Ballantyne*, 11 Grant, 119. Absence of defendant Chevrier's efforts to have his evidence corroborated in view of suspicious circumstances—commented upon.

Decree setting aside judgment with costs.

Howell, Q. C., and *Cameron*, for plaintiffs.

Munson, and *Fortin*, for defendants.

SHAW v. LAMARCHE.

JUNE 24, 1890.] [BAIN, J.

Injunction—Application for not bona fide.

This was an application on a friendly suit to restrain a teacher from giving religious instruction, Roman Catholic, in order to test the validity of The Public Schools Act.

Held—

1. That even in a special case, as distinguished from the request for the exercise of the extraordinary jurisdiction of the court by way of injunction, the court will decline to pronounce judgment if there be reason to believe that the action has not been brought *bona fide* to determine a matter really in controversy between the parties. *Duntze* v. *Duntze*, 6 C. B., 100.

2. That the jurisdiction of the court in a case of this nature rests upon injury to property, actual or prospective, and the court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal and do not affect the rights of property. *Emperor of Austria* v. *Day* and *Kossuth*, 3 D. G. F. and J. 253; *Springhead S. Co.* v. *Riley*, L. R. 6 Eq., 551; *Dixon* v. *Holden*, L. R. 7 Eq., 488.

Bill dismissed with costs.

Munson, for plaintiff.

Ewart, Q. C., and *Brophy*, for defendant.

FOREST v. GIBSON.

JUNE 24, 1890.] [KILLAM, J.

Demurrer—Pleading—Accord and satisfaction.

Defendant mortgaged certain lands to plaintiff by deed containing usual covenants. Defendant conveyed the lands to B., subject to the mortgage. Defendant pleaded equitably, alleging that plaintiff took quit claim deed from B. of B.'s interest in said lands, thereby estopping plaintiff from suing defendant on his covenant for payment on the mortgage, which was the plaintiff's cause of action. Plaintiff demurred on grounds that the plea did not allege that the plaintiff had in any way released the defendant from the obligations of the covenant, or set up anything which would estop the plaintiff from enforcing the covenant.

Held—

1. That a plea of simple accord and satisfaction is not defence at law to a count on covenant for payment of definite sums of money. *Massey* v. *Johnson*, 1 Ex. 241; *Webb* v. *Hewitt*, 3 K. and J. 438.

2. That where lands subject to a mortgage are conveyed to a third person subject to the mortgage, a court of equity

implies an obligation on the part of the grantee to indemnify the mortgagor against the mortgage debt. *Barry* v. *Harding*, 1 J. and Lat. 485; *Waring* v. *Ward*, 7 Ves. 333; 337; *Jones* v. *Kearney*, 1 Dr. and War. 155; *Campbell* v. *Robinson*, 27 Gr. 634; *R. E. Loan Co.* v. *Molesworth*, 3 Man. R. 116.

3. That where a plaintiff takes a conveyance of the equity of redemption in discharge of the mortgage, there may be some doubt as to whether the mortgagor is rightly termed in such case a surety for the grantee of the equity, when the latter has never become debtor directly to the mortgagee, yet the principle in *Webb* v. *Hewitt*, *supra*, appears equally applicable, and the defendant is entitled in a court of equity to claim that the debt has been wholly discharged.

4. The doctrine of merger is apparently applicable rather to the charge on the land than to the debt, and this should be considered as one of equitable accord and satisfaction, but see *North of Scotland Mortgage Co.* v. *German*, 31 U. C. C. P. 349; and *Id.* v. *Udell*, 46 U. C. Q. B. 511.

Demurrer to the amended plea overruled.

Patterson, and *Baker*, for plaintiff.

Hagel, Q. C., for defendant.

McGUINNEY v. CAN. PAC. R'Y. CO.

JULY 3, 1890.] [DUBUC, J.

Negligence—Reasonable accomodation—Misfortune.

Action for injuries sustained in alighting from train. Plaintiff arrived at D. on defendants train on a dark night at 10.30 p. m. There was no platform to alight upon at the point where the car stopped, and the station was not lighted. The lowest of the carsteps was 26 inches from the ground. A brakeman came with a lantern and offered to take plaintiff to the hotel in the village. Having

placed his lantern on the ground, which shed a broad light for a radius of between 20 and 30 feet, he assisted her to the ground from the car by holding her underneath the arms while she jumped off the steps. The plaintiff claimed that in so doing she sustained injuries to her knee, and though she immediately felt a sharp pain, yet said nothing about it to anyone at the time or till the next morning when a doctor was called in. She was unable to work, lost her situation and suffered a lengthy illness. It appeared by the evidence that for nearly a year previous to the accident she had been lame and almost constantly complained of a severe pain in her knee; she had further been treated at the hospital, and the physicians who attended her there, and elsewhere, stated that she had been affected with synovitis in a sub-acute form, and that exposure or injury of any kind might cause recurrence of the disease. The question to be tried was whether the injury was caused by the defendants negligence in not having a platform to alight upon, and no light at the station. After an exhaustive review of the cases on the point the learned judge

Held—

1. That although the plaintiff had not been guilty of carelessness or negligence on her part, and although the defendants had not provided a platform or lit the station, yet their servant having used such reasonable care and afforded such reasonable assistance to the plaintiff as would have been sufficient for the protection of a person with limbs in ordinary condition, the defendants were not liable, following *Crafter* v. *The Metropolitan R'y. Co.*, L. R. 1 C. P. 300; *Harrold* v. *The Great Western R'y. Co.*, 14 L. T. N. S. 440; *Siner* v. *The Great Western R'y. Co.*, L. R. 3 Ex. 150.

2. That had the plaintiff informed the brakeman of the feeble state of her knee, he would have had to take such

extra precautions as would have insured her safety. "The accident was one of those misfortunes which will occasionally occur, and of which people must bear the consequences." This dictum of Baron Parke in *Cornman* v. *The Eastern Counties R'y. Co.*, 4 H. & N. 781, approved of.

Verdict for defendants.

Hagel, Q. C., and *Bonnar*, for plaintiff.

Aikins, Q. C., for defendants.

BERTRAND v. PARKES.

JULY 14, 1890.] [BAIN, J.

Official assignee—Fraudulent preference—Rights of assignee.

Bill filed to set aside two chattel mortgages as void and fraudulent against other creditors. Plaintiff is official assignee of the estate of one Whitehead, under assignment dated 26th March, 1889, and at the instance of the creditors filed a bill to set aside, as fraudulent and void, two chattel mortgages made by assignor to defendant. First mortgage dated 31st of January, 1887, to secure payment on 1st February, 1888, of the sum of $1,064.74, moneys advanced, with interest at 10 per cent. The second dated 30 January, 1889, is to secure payment on 1 Dec., 1889, of the same amount with interest at 8 per cent. Both mortgages are expressed to be on all the stock-in-trade, shop furniture and everything connected with mortgagor's business in the premises occupied by him, as a general store, and also upon any stock to be purchased thereafter and which may be in his possession upon said premises, during the continuance of the security. First mortgage was never filed, the second was filed in the proper office on 25 February, 1889. This latter though dated 30 January, 1889, was not executed until 9 or 11 February in that year. No security was given at the date of the advancement, but afterwards, upon demand, it was

given. Both the debtor and defendant knew that the mortgage need not be registered at once, under the amended Chattel Mortgage Acts. The agreement was that the second mortgage was not to be registered but that the debtor was to advise the defendant if the former got into difficulties. In pursuance of advice to that effect, the second mortgage was registered and assignment made.

Held—

1. That the second mortgage was a preference and doubtless given with that intent and was therefore void under sec. 2 of The Act respecting Assignments.

2. That sec. 2 had the effect of changing the legal effect of transactions that came within it, and hence applied only to such transactions as have taken place since the Act became law. The question as to whether there was evidence of intent discussed, and *Whitney* v. *Toby*, 6 O. R. 55; *Burns* v. *McKay*, 10 O. R. 167; *Brayley* v. *Ellis*, 6 Ont. A. R. 565, referred to.

3. That filing a chattel mortgage is now optional, under 48 Vic., c. 35, sec. 2, and the mortgage only operates against creditors, purchasers or mortgagees, in good faith, from the day of such filing.

4. That the assignee is in the position of a purchaser for value following *McAllister* v. *Forsyth*, 12 Sup. Ct. 1; *May on Fraudulent Conveyances* pp. 238 and 240; *In re Mapleback*, L. R. 4 Ch. D. 150.

5. That the assent of a creditor is not necessary to make an assignment under the Act binding and irrevocable.

6. Where some of the creditors have constructive notice of a preference and still continue dealing thereon, "it is "equitable that the assignee should be affected by notice to "the other creditors. But the assignee takes the estate "for the benefit of the general body of creditors, and the

" policy of the Act will be best carried out by holding that " notice to individual creditors is not notice to him. " Notice to creditors will not make the assignee a *mala* " *fide* purchaser, and I would feel inclined to give the " decision in *McAllister* v. *Forsyth* its full effect." The difficulty experienced, where some creditors had notice and others not, and the assignee being for the whole body, discussed.

7. " It is not necessary for me to decide the point"—as to whether it was fraudulent and void because given secretly under an agreement not to register—" but my " impression at present is that the agreement not to " register, while tending to shew that the whole transaction " was a fraud on creditors, is not in itself a fraudulent " one, and that the amendment to The Chattel Mortgage " Act has enabled parties legally to do just what it was " the policy of the Act to prevent."

8. That the second mortgage in the facts of this case has taken the place of and cancelled the first, following *McMartin* v. *McDonald*, 10 U. C. Q. B. 399; *Hollingsworth* v. *White*, 6 L. T. N. S. 604.

9. The rights of the assignee beyond the powers given in sec. 7 are very doubtful, and the power to sue given by sec. 7 is less extensive than that given an assignee under The Insolvent Act 1885, and even under that Act, it is very doubtful if the assignee was in the position of an execution creditor. *Snarr* v. *Smith*, 45 U. C. Q. B. 56; *re Andrews*, 2 Ont. App. 24; *re Barrett*, 5 Ont. 206; *Parkes* v. *St. George*, 10 Ont. App. 541.

Mortgages declared fraudulent and void.

Howell, Q. C., and *Crawford*, for plaintiff.

Ewart, Q. C., for defendant.

PRACTICE.

CARR v. WADE.

MAY 29, 1890.] [TAYLOR, C. J.

Real Property Act—Petition—Amendment—Pleading title of petitioner.

Petition filed by Carr, caveator, was not intituled under the Real Property Act, nor did it allege that an application had been made by the caveatee, to bring the lands under the Act nor that a caveat had been filed.

Held—

That the petition was insufficient, but the hearing was enlarged for a week with leave to the caveator to amend upon payment of costs.

JUNE 5, 1890.] [DUBUC, J.

The petition as amended alleged that one A, being owner of an estate in fee simple in possession in the lands in question conveyed to the petitioner who thereby became and was now owner in fee simple in possession.

Held—

That this was a sufficient allegation of the title of the petitioner.

Cumberland, for caveator.

McLeod, for caveatee.

REGINA v. STARKEY.

JUNE 2, 1890.] [TAYLOR, C. J.

Certiorari—Practice.

The defendant renewed his application, see ante p. 62.

Held—

1. That apparently the County Court Judge was a *persona designata.*

2. That, even if an appeal is now pending, and being proceeded with, the defendant's right to a certiorari, is not thereby affected, at all events, it is not so, unless the question of jurisdiction is raised on the appeal and could not be so under 52 Vic., cap. 15, secs. 126 and 127. *Regina* v. *Allan*, 4 B. and S. 915.

3. That although the writ may be directed to the convicting justices, as well as the County Court Judge, it seems in this case it is only necessary to address it to the latter.

Writ issued.

Cassidy, for applicants.

Mulock, Q. C., for prosecution.

HOWE v. MARTIN, *et al.*

JUNE 7, 1890.] [FULL COURT.

Practice—Settling security for costs.

In an interpleader issue, the plaintiff on April 3, 1890, was ordered by the Referee, to give security for the costs of a claimant, before April 10. When the order was made, the plaintiff's counsel intimated to the claimant's attorney, that security would probably be given in money. The money was paid into court on April 10, and the plaintiff thereupon applied to the Prothonotary for an allowance of the security but the latter, although he expressed himself as satisfied with it, said the claimant's attorney must be notified of the application. The attorney refused to consent to an allowance, without notice, and the Referee, upon an application extended the time for putting in the security, until April 18. The claimant appealed, and the order of the Referee extending the time was reversed, on the ground that the plaintiff by not putting in his security on the 10th, was barred, pursuant to the terms of the order of

the 3rd, and also that the Referee was *functus officio* after the taking of the order of the 3rd.

It was shown by the claimant upon appeal, that the plaintiff had applied to have the time for appealing from the original order extended, and to be allowed to appeal from the portion barring the execution creditor, or limiting the time for giving security, which application was refused, and also that the sheriff had abandoned possession to the claimant.

Held—

1. That the Referee, who was authorized to make the order fixing the time within which the security should be furnished, had equally the power to extend the said time, on proper cause being shewn. A. J. A. Act 1885, sec. 58, referred to.

2. That the objections were not fatal, but that if the sheriff by abandoning possession to the claimant prevents a hearing of the motion, then the result would be, that the sheriff and claimant would have been able on their own motion, to insure that the question should be disposed of upon the basis of the Referee's second order being invalid.

Appeal allowed with costs, Referee's order restored.

Monkman, for plaintiff.

Ewart, Q. C., and *C. P. Wilson*, for claimant.

Present—TAYLOR, C. J., DUBUC and KILLAM, JJ.

TODD v. UNION BANK.

JUNE 7, 1890.] [FULL COURT.

Practice—Retroactive effect of statute relating to procedure—Costs.

This action was begun in 1883. There were several new trials. The juries gave verdicts for $1,500, $1,000, $500, and finally $101. No certificate for costs was granted upon the last trial, and the question arose, as to whether

the plaintiffs were entitled to Q. B. costs, in that $101 was within the County Court jurisdiction. The plaintiff would have been entitled to Q. B. costs, had the statute in force at the time of the commencement of the action, not been repealed, viz.: C. S. M., cap. 34, sec. 33, sub-sec. 2, and as provided for in rule 10. But the proviso was repealed by 47 Vic., cap. 22, sec. 3, from and after July 1, 1884.

Pending actions were not saved. Cap. 21, sec. 13, of same year—sec. 133 A. J. A. Act 1885—was also passed, providing for the costs to be taxed "in case an action of the proper competance of the County Court *be brought* in the Court of Q. B." . . . . the Judge who presides may grant a certificate giving Queen's Bench costs. The Judge refused to give the certificate. Upon taxation, the Prothonotary allowed Q. B. costs, holding that the statute was not retroactive. From this the defendant appealed and the appeal was allowed. The plaintiff then appealed to the full court.

Held—

1. That the question as to what costs a party in an action shall tax must be held to be a matter of practice and proceedure.

2. That the presumption against giving a statute a retrospective operation, does not apply to enactments which affect only the practice and procedure of the courts, and grammatically construed, this statute did not refer to future actions.

3. That the fact that an application of the rule will work a hardship by depriving a successful party of costs, that he had the right to count on getting when he began the action, is not such a "good reason" as will prevent its application. *Wright* v. *Hale*, 30 L. J. Ex. 40; *Gardiner* v. *Lucas*, 3 Ap. C. 582, and 603; *Attorney General* v. *Sillem*, 10 H. L. 763; *Freeman* v. *Moyes*, 1 A. and E. 338; *Burn et al.* v. *Carvalho*, 1 A. and E. 883; *Kinbray* v.

Draper, L. R. 3 Q. B. 160; *Ings* v. *London and S. W. Ry.*, L. R. 4 C. P. 17.

Appeal dismissed with costs.

Hagel, Q. C., and *Howden*, for plaintiff.

Ewart, Q. C., and *Bradshaw*, for defendants.

Present—DUBUC, KILLAM and BAIN, JJ.

CASE v. STEPHENS.

JUNE 12, 1890.] [DUBUC, J.

Practice—Filing exhibit.

" Appeal from an order of the Referee. The question " to be determined is, whether on filing an affidavit with " papers referred to in the same, and annexed thereto, each " paper should be considered as a distinct filing, and a law " stamp of the proper denomination should be affixed " thereto. The Order-in-Council fixing the law stamps to " be put on papers required to be filed says :

" Filing each paper (other than affidavit)..10 cts.

" Filing each affidavit.....10 cts.

" The Referee held that the first above mentioned term " applies to every paper annexed to an affidavit."

" The practice with regard to filing or depositing docu- " ments referred to in affidavits is laid down in *Lowndes &* " *Maxwell*, Bail Court cases p. 13, note *a*, as follows :

" It is optional with the party making the affidavit, to " annex to it, the document or not. If he does annex it, " the document is filed with the affidavit, and cannot after- " wards be taken off the file, without a Judge's order to " that effect. If he does not he refers to it in his affidavit " as a document 'marked A. and exhibited to this de- " ponent at the time of swearing this affidavit.' In the lat- " ter case he must produce the document, at the time of " swearing the affidavit, and must deposit it in the Rule " Office, there to remain until the rule to obtain which the

" affidavit is filed, is disposed of. As soon as that occurs " the party is entitled to have the document delivered " back to him whether the rule is drawn up or not."

" From this it would appear that the document an- " nexed to an affidavit is filed with it, and is not considered " as a distinct filing."

" I think the above mentioned item in the Order-in- " Council respecting 'each paper other than an affidavit,' " does not apply to documents annexed to affidavits."

" The appeal should be allowed without costs."

Wilson, for plaintiff (appellant).

Haney, for defendant.

THE MERCHANTS BANK v. McMICKEN.

JUNE 18, 1890.] [DUBUC, J.

Practice—Revivor.

Bill for the sale of lands under a certificate of judgment. The judgment was recovered against two defendants, one of whom died after same but before the issue of the certificate. Action against the surviving defendant. Judgment was signed Oct. 9, 1884, and certificate issued February 1, 1890.

Demurrer on the ground that the certificate could not issue, until the judgment had been revived, or a suggestion made on the record and the deceased's representatives made parties.

Held—

1. That the certificate was valid as to the surviving defendant under A. J. A. Act 1885, sec. 111; notwithstanding C. L. P. Act 1852, ss. 129 and 130..

2. That the representatives need not be made parties, for to do so where the cause of action against one defendant is totally disconnected with that of the other defendants, so far as it arises out of an incidence in the same

transaction, is a misjoinder. *Burstall* v. *Beyfus*, 26 L. R. Ch. D. 32.

Bill dismissed with costs.

Tupper, Q. C., and *Phippen*, for plaintiffs.

Kennedy, Q. C., for defendant.

McCANN v. AIKINS.

JUNE 19, 1890.] [BAIN, J.

Real Property Act—Pleading—Plaintiff in issue.

Application by A. to bring land under the Real Property Act, claiming title under a tax deed. Petition filed by M., caveator, asking to have himself declared mortgagee of the lands.

Objections taken by caveatee to frame of petition :

That it did not state the title of the caveatee, in that it did not allege that the caveatee claimed any title to the lands except by applying for a certificate of title ; and that it did not allege that the application for a certificate was not subject to the mortgage of the caveator.

Held—

1. That the statement of title was sufficient in form, the ordinary rules of setting up adverse title not applying to such a petition.

2. That the caveatee, claiming under a tax deed subsequent to caveator's mortgage, should be plaintiff in the issue.

Issue so directed.

C. P. Wilson, for caveator.

McLeod, for caveatee.

[See *Carr* v. *Wade*, p. 88 ante.]

MERCHANTS BANK v. GOOD, *et al.*

JUNE 23, 1890.] [DUBUC, J.

Practice—Misjoinder of defendants—Amendment.

Action on note before a special jury. Note dated May 1883, due two months later, was made by John G. & Co., and endorsed to the plaintiffs. They sued John G. and W. G., sr., trading as John G. & Co. Plaintiffs ascertained after appearance that W. G. had never been a partner with John G. Upon examination John G. admitted he had a partner, but declined to state who he was, as the question did not arise upon the affidavit on which he was being examined. Subsequently the plaintiffs amended by adding W. Beach as a defendant. Both defendants pleaded *non fecit*, and were not examined on their pleas. Upon the trial, it appeared that the note had been paid but the plaintiffs were innocent holders thereof. It also appeared that W. Beach was not a member of John G. & Co., but Samuel Beach was the real co-defendant. His Lordship dismissed the jury and the plaintiffs applied to strike out W. B. and add S. B.

Held—

1. That formerly, before a defendant could be struck out his consent had to be first obtained, citing C.L.P. Act 1852, sees. 35 and 37, and also the *dictum* in *Burrit* v. *Hamilton*, 17 U. C. Q. B. 443 ; that although this had been the case, it was not now required in practice either in England or Canada, *L. S. Nav. Co.* v. *Beatty*, 34 U. C. Q. B. 201.

2. That apparently an amendment would be refused in certain cases, if the defendant were joined not by mistake, but with a full knowledge of the facts of the case, in order to fasten a doubtful liability upon him. *Wickens* v. *Steel*, 2 C. B. N. S. 488.

3. That if an amendment were allowed, it could only be, on the terms that the defendant John G. be allowed to

plead in abatement, and also *de novo*; *McKee* v. *Joli*, 20 U. C. C. P. 516, but that since the writ issued the liability of S. B. on the note has been barred by the statute of limitations, and even if he were within the jurisdiction—he was in the N. W. T.—it would be useless for G., under 9 Geo. IV., cap. 14, sec. 2, to plead his non-joinder, and the plaintiffs could proceed against him alone. In the view of this injustice,

Application refused with costs.

Howell, Q. C., and *Phippen*, for plaintiffs.

Ewart, Q. C., and *C. P. Wilson*, for defendants.

McMICKEN v. ONTARIO BANK.

JUNE 28, 1890.] [DUBUC, J.

Staying proceedings pending re-hearing.

Bill filed by M., a married woman, by her next friend to set aside a deed of conveyance for fraud, etc., or to have it declared a mortgage. $400 were paid into court by the plaintiff as security for costs. Judgment was reserved at the hearing and afterwards given, dismissing the bill with costs.

Application by the plaintiff at the time of delivery of judgment for a stay of proceedings, pending re-hearing without giving further security for costs.

The defendants relied on *Chadwick* v. *Hunter*, 1 Man. R. 109.

Held—

That the matter was in the discretion of the court and that under the circumstances proceedings should be stayed, pending re-hearing without further security for costs.

Kennedy, Q. C., for plaintiff.

Ewart, Q. C., for defendants.

RE TAIT.

JULY 14, 1890.] [FULL COURT.

Real Property Act—Primogeniture—Right to appeal from judge's opinion.

Appeal to the Full Court from the decision of Hon. Mr. Justice Dubuc, reported ante p. 76.

Held—

That there could be no appeal from the decision of a judge, upon a case stated for the opinion of the Court or a Judge, by the District Registrar under secs. 119 and 120 of The Real Property Act of 1889; but that the Full Court in its discretion might, in a case of exceptional import or general interest, still entertain the matter on a re-statement of the case to it by the District Registrar.

Case struck off the list.

Crawford, for Tait.

C. P. Wilson, for the Attorney-General.

Present—TAYLOR C. J., DUBUC and KILLAM, J. J.

N. W. TERRITORIES.

MOORE v. MARTIN.

JUNE 2, 1890.] [FULL COURT.

Practice—Leave to issue ex juris writ unnecessary.

In this case a writ was issued in December, 1888, by the plaintiff against the defendant for $50,000 for the purchase price of an interest in a ranch, and as the defendant resided in England, leave was obtained to serve the defendant out of the jurisdiction, but no leave to issue a writ for service out of the jurisdiction had been obtained. The defendant applied to *Rouleau*, J., at Calgary, to set aside the writ and service on the ground, among others,

that leave should have been obtained from a judge before the issuing of the writ, following the English practice in such cases. The application was dismissed with costs. The defendant then appealed to the Full Court on the same ground, among others.

Held—

That under the Civil Justice Ordinance, 1886 (which governed this case) it was necessary to obtain leave to serve a writ out of the jurisdiction, but not to issue the writ, and that the English practice in that respect was varied by the various sections of the C. J. O., 1886, affecting that question. *Wetmore*, J., dissenting.

Appeal accordingly dismissed with costs.

Davis, for plaintiff.

McCarthy, Q. C., for defendant.

Present—RICHARDSON, MCGUIRE, and WETMORE, J J.

BANNERMAN v. EMERSON *ET AL.*

JUNE 2, 1890.] [FULL COURT.

Decision reported ante page 44 affirmed on appeal.

Wetmore, J., hesitante.

McCarthy, Q. C., for respondents (plaintiffs.)

Davis, for appellants (defendants).

Present—RICHARDSON, MCGUIRE, and WETMORE, J J.

LOUGHEED *ET AL* v. PRAED *ET AL.*

JUNE 2, 1890.] [FULL COURT.

Reported ante page 67. Judgment of *Rouleau* J. as to right to administer interrogatories upheld on appeal. Appeal allowed on ground that there was not sufficient material before judge at time of issue.

Scott, Q. C., and *Phippen*, for appellants (defendants.)

McCarthy, Q. C., for respondents (plaintiffs.)

Present—RICHARDSON, MCGUIRE and WETMORE, J J.

THE

WESTERN LAW TIMES.

NOTES OF RECENT DECISIONS.

MANITOBA.

WINNIPEG WATER WORKS v. CITY OF WINNIPEG.

June 16, 1890.] [ARDAGH, Co. J.

Assessment—Defective notice.

Appeal from Court of Revision on the ground that the assessment was improper and excessive. Two items were not objected to, but the third was, on account of uncertainty. The notice was the usual printed form, and a third item or line therein read "Includes $150,000 for Mains, Pipes (laid), Hydrants, Engines, Boilers, Pumps, &c., $155,000." No technical objection was taken in the Court of Revision, save that the assessment was "improper." No one appeared therein and the assessment was confirmed.

1. That in view of the Company's knowledge of what the assessment meant, taking into consideration their neglect to apply for such information, in view of the terms of the notice, and also the tendency of the courts to not give effect to technical objections where no injustice is done, effect would not be given to an objection on the ground of uncertainty in this case.

2. That under 51 Vic., cap. 27, sec. 28 and 49 Vic., cap. 52, 50 Vic., cap. 10, sec. 35, declaring that certain plant and machinery laid in the ground, should be personal property, and that an assessment shall be invalid by reason of property being wrongly classed, the assessment was not invalid.

3. That the value of the plant was to be estimated so as to include the cost of placing it in position.

Appeal dismissed.

Ewart, Q. C., and *Brophy*, for appellants.

Isaac Campbell, Q. C., for respondents.

[NOTE.—An appeal has been entered from this decision. See article on *The Taxation of Pipes in Public Streets* by J. H. Beale, jr., in *Harvard Law Review*. May, 1890. ED. W. L. T.]

RE KILDONAN.

July 17, 1890.] [ARDAGH, Co. J.

Assessment—What constitutes improvements.

Appeal from Court of Revision. The buildings and fifteen acres were assessed as "Real Property" at $3900. The buildings and outbuildings, it is admitted, are worth a great deal more than the whole assessment. The appellants, N. F. Hagel and Annie Summers, claim that the sum at which the buildings are supposed to have been valued, should be struck off, on the ground that the land is being used for farming purposes, and that the buildings are "improvements" within the meaning of 50 Vic., cap. 10, secs. 30 and 31, and are therefore exempt. The assessment was made under 50 Vic., cap. 10, sec. 30, which makes "all lands and personal property" taxable, subject to certain exemptions among which is one in these words: "All lands in rural municipalities, improved for farming purposes, shall be assessed at the same value as if such lands would be assessed if unimproved, but in case of lands

improved for other purposes the value of such improvements shall be added to the assessment of such lands."

Held,—

1. That statutes giving exemptions will be construed strictly and most strongly against those claiming the exemption. Dictum in *Dillon on Corporations* approved of.

2. That the words "land" "real property" and "real estate" are declared to include all buildings or other things erected upon, or affixed to, the land, and therefore all buildings erected upon or affixed to the land, being, or being made, part and parcel of the land itself, cannot be held to come within the term "improvements" distinct from the land in its natural state or condition; and the Legislature having made the word "land" include buildings, the latter will not be distinguished from the land, without distinct or apt words being used for the purpose.

3. The lands in the present instance were used as a farm or garden, but the improvements are not made for that purpose as the occupant claims to have another occupation and to be engaged therein.

Appeal dismissed.

The *Appellant* in person.

G. F. Munroe, for the Municipality.

DYSART v. DRUMMOND, *et al.*

JULY 19, 1890.] [BAIN, J.

Demurrer—Pleading.

The plaintiff sued for damages for breach of an agreement to sell lands. No tender of a conveyance was made and the defendants pleaded non-tender. The agreement was one *to convey*. Demurrer to defendants' plea, that it was no reply, etc.

Held—

1. That in a contract for the sale of lands, the strict rule is that, unless it is expressly stipulated otherwise, it is

incumbent on the vendee to prepare the conveyance at his own expense and tender it to the vendor for execution, and the vendee cannot maintain an action for the non-completion of the contract without averring that he had tendered the conveyance. *Poole* v. *Hill*, 6 M. and W. 825; *Stephens* v. *De Medina*, 4 Q. B. 422.

2. That where a vendor has bound himself to *convey* the lands to the vendee, the intention is thereby shewn to depart from the general rule and the vendor, in order to carry out his contract to convey, must prepare and deliver the deed himself. *Burns* v. *Boyd*, 19 U. C. R. 547; *Thayer* v. *Street*, 11 U. C. C. P. 243; *Parker* v. *White*, 25 U. C. R. 115.

Demurrer allowed with costs.

Wade, for plaintiff.

Kennedy, Q. C., for defendants A. T. Drummond and Montreal and Western Land Co.

Bradshaw, for defendant C. S. Drummond.

ASHDOWN v. FREE PRESS.

JULY 25, 1890.] [FULL COURT.

Libel—Special damage—Pleading.

Action for libel against an incorporated newspaper company. The first and second counts set out the alleged libel as published, the third and fourth allege publication, and, with a view to special damage, that plaintiff was carrying on business. The defendants pleaded not guilty, denial of plaintiff carrying on business, and justification.

Held—

1. That the words of the Act, 50 Vic., c 23, sec. 1, requiring an 'affidavit or affirmation' left the deponent the option of making either an affidavit or affirmation, though he was not a person entitled under 17 and 18 Vic, c 125, sec. 20, to insist on his right to do so, from conscientious scruples.

2. That the courts will not scrutinize affidavits required by statutes with the same strictness, as those to be used in a proceeding in court. *Re Prince Henry*, 49 L. J. Prob. 67; *De Forrest* v. *Bunnwell*, 15 U. C. 370; *Mann* v. *Western Ins. Co.*, 17 U. C. 190; *Moyer* v. *Davidson*, 7 C. P. 52; *Mowat* v. *Clement*, 3 Man. R. 585.

3. That the court will take judicial notice of its officers, and the *onus* of proving that the commissioner before whom the affirmation was taken was not a commissioner, is on the person asserting that he is not. *Frost* v. *Hayward*, 10 M. and W. 673; *Burdekin* v. *Potter*, 9 M. and W. 13; *Sharpe* v. *Johnson*, 4 Dowl. 324.

4. That the fact that the affirmation contains a clause that the deponent made it 'by virtue of 'An Act respecting Extra-Judicial Oaths' did not invalidate it, where it is in other respects, such an affirmation as satisfies the requirements of the Act.

5. That it is unnecessary to plead the statute, as the defendant under a plea of not guilty could raise the defence of privileged communications. *Lilly* v. *Price*, 5 A. and E. 645.

6. That under 50 Vic., c. 22, sec. 11, as to actual malice or culpable negligence in cases where special damage is claimed, such special damage must be both pleaded and proved to relieve from the requirements thereof.

7. That where special damages are claimed in consequence of the loss of custom or business, the names of the customers whose business had been lost are required to be set out. *Evans* v. *Harris*, 1 H. and N. 251; 26 L. J. Ex. 31; *Bullen and Leake*, 306; 308, *Riding* v. *Smith*, 1 Ex. Div. 91; 2 Chitty on Pl. 543, 548.

New trial directed.

Ewart, Q.C., and *Culver*, Q.C., for plaintiff.

Howell, Q.C., and *Cumberland*, for defendants.

Present—TAYLOR, C. J., DUBUC and BAIN, J J.

RYAN v. WHELAN.

JULY 25, 1890.] [FULL COURT.

Validating acts—What are taxes in arrear.

The facts are fully set out ante p. 30 (May No.) Sections of Acts therein referred to vesting title in claimant, were under discussion.

Held—

1. That the validating sections must be construed, not only as requiring the claimant under sales of lands for taxes to prove the execution of the deed by the proper officers, but he must in addition show an actual sale and the existence of arrears of taxes at the time of the sale. *Hamilton* v. *Eggleton*, 22 U. C. C. P. 536; *Proudfoot* v. *Austin*, 21 Gr. 567; *Kempt* v. *Parkyn*, 28 U. C. C. P. 123. *Stevenson* v. *Traynor*, 12 Ont. R. 804; *McKay* v. *Crysler*, 3 C. S. C. R. 436.

2. That notwithstanding the sections cited from the Acts of 1881, 1882 and 1883, it was necessary for the defendants to prove that there were at the time of the sale the prescribed arrears of taxes due, to warrant the sale. See cases *supra* and also *Jackson* v. *Moise*, 18 Johns. 441; *Varick* v. *Tallman*, 2 Barb. 113; *Doughty* v. *Hope*, 3 Den. 594.

3. "This sale was made under 44 Vic., cap. 3, sec. 53, "which required that there should be two years arrears "due, to warrant advertisement and sale. Neither by the "Act of 1880, 43 Vic., c 1, nor by that of 1881, were taxes "absolutely imposed upon the property. . . . By sub-"section *i* of the 22nd section of the former statute and "the 35th sec. of the latter, the council . . was required "and empowered, after the final revision of the assessment "roll on each year to pass a by-law levying a rate. With-"out such by-law, the lands could not be liable for any "rate, except perhaps the commutation tax for statute "labor. As to the latter, I have failed, after careful

"examination of the statutes, to find any legislation in force "in 1880 making the statute labor assessment, or the com- "mutation charge in lieu thereof, a lien or charge on the "lands, or authorizing a sale of the lands by officers of the "municipalities for its enforcement. There is great reason "to doubt whether owners of land in organized municipali- "ties were liable to perform statute labor in 1880." Per *Killam, J.* The question as to whether under the Act of 1881, as to a sale of lands for commutation tax, might be authorized, was not decided.

4. The passing of a simple resolution, as to a rate before the revision of the assessment roll, instead of a by-law, was invalid to impose a lawful rate. The final revision of the assessment roll was a condition precedent to the validity of a by-law, and therefore there was no rate levied.

5. That 51 Vic., c 27, sec 58, validating all past assessments and rates did not operate to pass to the defendant the title to this land, if he did not previously possess it. The position was, that on account of there not having been a valid rate levied, there was no power on the officers of the municipality to dispose of the land.

6. Such enactments must be construed strictly, and it must be held to make all past rates valid, so as to make them attach on the lands, and warrant future sales.

7. That secs. 673 and 681, Municipal Act, 1886, both originally and as amended by 50 Vic., c 10, sec. 52, must be interpreted so as to require, that there should have been arrears existing for such a time as to warrant the sale, and that it would not be sufficient to validate a deed under this section, that there should have been at the time of the sale, some taxes in arrear for which the sale could at a *subsequent* date be properly made. "It should be construed as if it read that there were no taxes due and in arrear upon such land at the time of the sale for which could then be sold by such municipality." *Per Killam, J.*

Mr. Justice Bain, also delivered a judgment concurring with Mr. Justice Killam, discussing the above questions from a different standpoint.

Appeal allowed; verdict for plaintiff.

The *Attorney-General*, for the appellant (plaintiff.)

Mulock, Q.C., for the defendant.

Present—DUBUC, KILLAM and BAIN, J J.

STARKEY v. NORTH DUFFERIN.

July 31, 1890.] [KILLAM, J.

Injunction—Liquor License Act—Remuneration.

Motion for an injunction to restrain a municipality from paying an inspector, appointed by it under the Liquor License Act, certain fees and costs in connection with a liquor prosecution within its limits.

Held,—

That under The Municipal Act of 1890, sec. 375, subsec. 23; as under Municipal Act 1886, sec. 347, subsec. 23, authorizing the council to pass by-laws 'for appointing such constables, poundkeepers, fence viewers, overseers of highways, road surveyors, road commissioners, valuators, and other officers, as are necessary in the affairs of the corporation, or for carrying into effect the provisions of any Act of the Legislature and for regulating the remuneration, fees, charges and duties of such officers,' the municipality could properly defray the reasonable expenses of such an inspector, in and about such prosecutions, but not to undertake generally the enforcement of Acts of the Legisature, save the appointment of officers, to carry into effect enactments authorizing or requiring the municipalities to perform particular functions.

Motion dismissed with costs.

Ewart, Q. C., and *Cassidy*, for plaintiff.

Hough, for defendants.

WESTERN CANADA LOAN ETC. CO. v. SNOW.

Aug. 2, 1890.] [TAYLOR, C. J.

Demurrer—Effect of recent legislation upon fi. fa. lands.

Bill filed to set aside fraudulent conveyances. The plaintiff sues for himself and all the other creditors of one G., alleging that in 1885 they recovered a judgment against G. and another; that executions against lands were placed in the sheriff's hands and duly renewed but are ineffective. It also alleges that certain conveyances were fraudulently made by G. then insolvent, for the usual purpose, to the defendant Snow. It submits that the deeds are void and contains the usual prayers. The defendant demurs for multifariousness and want of equity. It was objected that the plaintiffs, being judgment creditors, cannot sue as well on behalf of themselves as of all the other creditors. 52 Vic., cap. 36, repealed the power to sell lands under execution, but provided that all writs then in the sheriff's hands "shall remain in full force, virtue and effect, and may be renewed from time to time." 53 Vic., cap. 3, passed at the succeeding session, restored the power to sell as to these last mentioned writs. It was also objected that by this legislation lands were not at the time the bill was filed, saleable under execution. Against this it was argued that the question was whether there was property available for creditors.

Held,—

1. That where a bill is filed by a simple contract creditor seeking to have a conveyance set aside as fraudulent, he must sue on behalf of himself and all other creditors, and he may apparently do so when he is a judgment creditor, although he may have a priority over the other creditors by virtue of his execution, and they only to share in the surplus, yet there is a common interest in having the conveyance set aside. *Goldsmith* v. *Russell*, 5 D. M. and

G. 547; *Scott* v. *Hunter*, 14 Gr. 376; *Sawyer* v. *Linton*, 23 Gr. 43; *Morphy* v. *Wilson*, 27 Gr. 1.

2. That the right to sell lands in this Province under an execution arises solely through 34 Vic., cap. 5, and no such writ existed in England prior to 15 July, 1870. See also 38 Vic., c. 5, ss. 53, 54, 55; C. S. M., c. 37, ss. 82 and 83; A. J. A. 1885, secs. 106, 108 and 110 as amended by 49 Vic., cap. 35, sec. 13; all repealed by 52 Vic., cap. 36, sec. 7.

3. That the meaning of 52 Vic., cap. 36, sec. 13, above set out, is that as the writs were then in the sheriff's hands as writs under which lands could be sold, they were to continue to be renewed from time to time and kept ready in full force, virtue and effect, for use for their original purpose whenever the Legislature might permit them to be used. This is evidenced by the granting of a remedy at the next session by 53 Vic., cap. 3.

Demurrer overruled with costs.

Munson, for plaintiffs.

Howell, Q. C., for defendants.

RE R. L. ASHBAUGH, AN ATTORNEY.

AUGUST 2, 1890.] [TAYLOR, C. J.

Attorney—Striking off rolls—Criminal charge.

Rule calling upon an attorney to shew cause, why he should not be struck off the rolls. The facts are given ante p. 13 [April No.] Affidavits were filed in support, but the Attorney's affidavit in opposition simply denied the charge made.

It was objected *inter alia* that the proceedings were too late, and that the charge being criminal, the court would not interfere before conviction.

Held—

1. That proceedings were not too late in view of the circumstances of this case. *Archibald's Pr.* 152; —— 2 B and Ad. 766; *Garry* v. *Wilkes*, 2 Dowl. 649.

2. That the court will interfere before conviction, notwithstanding that the charge is criminal, following *Anon* 17 Sol. J., Q. B. 269, 598. *In re a Solicitor*, 37 W. R. 598.

Rule enlarged until the master reports on the evidence.

Howell, Q. C., and *Wade*, for Law Society.

Ewart, Q. C., for R. L. Ashbaugh, the attorney.

[This overrules the former decision reported ante p. 13, and 6 Man. R. 398.—Ed. W. L. T.]

PRACTICE.

WINNIPEG WATER WORKS CO. v. WINNIPEG STREET RAILWAY CO.

JULY 17, 1890.] [FULL COURT.

Practice—Appeal from County Court—Certificate of County Judge.

Action to recover value of a water meter. Ardagh, Co. J., entered verdict for defendants on trial. Plaintiffs moved for a reversal of the judgment or a new trial, which motion was refused by same judge, and then appealed from this decision. The certificate of the County Judge was to the following effect:

"I certify that the foregoing is a true statement of the cause of action in the suit of The Winnipeg Water Works Company against The Winnipeg Street Railway Company, numbered 7585 in the County Court of the County of Selkirk, and of the proceedings therein in said Court; the

evidence in substance taken at the trial or hearing, with the objections of counsel, and my judgment or decision thereon and upon the application or applications of either party herein."

"Given under my hand in pursuance of the appeal clause of the County Court Act, this 7th day of June, 1890."

"(Sd.) W. D. ARDAGH,
Judge Co. Courts E. J. D."

Defendants counsel objected that this certificate, attached to the appeal book, did not comply with the requirements of sec. 245 of the County Courts Act of 1887, or properly certify to the evidence, etc.; the certificate being merely to the effect that the evidence was the evidence "in substance" and not "the evidence and all objections and exceptions thereto" as required by the statute.

Held—

That there was not a proper certificate.

Appeal struck out with costs.

Bradshaw, for plaintiffs.

Cumberland, for defendants.

Present—TAYLOR, C. J., DUBUC and KILLAM, J J.

MILLER v. McCUAIG.

JULY 18, 1890.] [FULL COURT.

Practice—Appeal from judge's order—Verification of copy of order appealed from.

Appeal by defendant from the order of the Chief Justice, reported ante p. 10.

This case was entered, on March 22 last, on the list of appeals for Easter term, and stood over by consent till the present (Trinity) term. No objections were taken to the regularity of the appeal. Counsel for the appellants having opened the case, and having proceeded with his argument was stopped by the court and objection taken by the court that the appeal could not be heard as the three copies of the order appealed from, and supplied to the judges, were

not verified by affidavit. Defendants counsel urged that this was unnecessary and quoted the Rule of Court in support of this contention. "29. The party setting down a cause for hearing, or entering a cause to be re-heard or reviewed, shall, at any time of setting down or entering, deliver to Prothonotary three copies, if any, of the decision of the Judge." ‡

Held—

That the appeal should be dismissed, there being no affidavit verifying the copies of the order appealed from.

Appeal dismissed with costs.

Appellants counsel obtained leave to apply, under rule 66†, for an order to extend the time of appeal, or to set down and enter the appeal notwithstanding the lapse of time, and filed, in addition to an affidavit verifying the order, an affidavit of the defendant's attorney stating, *inter alia* :

4. At the time of setting down and entering the said appeal as aforesaid, I enquired of the Prothonotary of this court as to the practice in reference to the material which was required by the Judges on the hearing of said Appeal, and he informed me that the three copies of the said Order would have to be filed, and nothing further.

5. I am not familiar with the Practice on the Common Law side of this Court in connection with appeals to Full Court, but from the wording of the general Orders of this Court, and from what I was told by the said Prothonotary, I assumed and believed that I had done everything necessary to bring this Appeal on for hearing before this Honorable Court *in banc.*

6. No objection has ever been taken to the regularity of said Appeal since the same was set down for hearing as aforesaid, and I believe the Plaintiff has not in any way been prejudiced by the motion on my part to verify the said Order appealed from.

---

‡This rule is not repealed by rule 84, nor does it come within the scope of rule 52. ED.

†Rule 66—The time for entering any application or a cause or matter for rehearing, under the foregoing rules may in any case in which it shall seem just be extended by the full court in term or by a judge in chambers in vacation, and either before or after the time limited by the foregoing rules shall have expired, and upon such terms and conditions (if any) as may seem proper.

7. I did not verify a copy of the said order appealed from for the reasons aforesaid, and I say that had I known of or believed such to be the practice of this court I would have done so. I have acted in good faith in prosecuting such appeal, and not for the purpose of delay.

On the following day, July 19, counsel for appellant moved for the order in pursuance of leave reserved, but the Court,

Held—

That sufficient cause had not been shown for the granting of the motion. Case struck off the list with costs.

The Hon. Attorney-General, for plaintiff.

Howell, Q. C., and *Hough*, for defendant (appellant).

Present—DUBUC, KILLAM and BAIN, JJ.

GRANT v. HUNTER.

JULY 25, 1890.] [TAYLOR, C. J.

Commission under R. P. Act cannot issue.

A commission cannot issue in an interpleader issue, and hence not under the R. P. Act practice, modelled thereon.

The facts appear from the

Judgment—

This is a matter under The Real Property Act of 1889, in which an issue has been directed, to be tried before a judge. The defendant now moves for an order, for a commission to examine a witness at Edmonton, in the Northwest Territories, and to postpone the trial, until it has been returned. The granting of a commission is opposed by the plaintiff on the ground, among others, that there is no jurisdiction to order a commission, except in an 'action' depending on the court, and an interpleader issue, to which the present is similar, is not an action.

The power of the court to issue foreign commissions, at least on the common law side, is derived from 1 W. IV. c. 22 which says, 'in every action depending on such court' a commission may be ordered to issue. That an interpleader

issue is not an action within the meaning of this act seems to have been decided in *The Massey Dock Board*, 11 W. R. 283; where the court directed an action to be brought in order that a commission might be executed. The head note in *Douglas* v. *Burnham*, 5 Man. R. 261, is wider than the judgment which was merely that "cause" included an interpleader issue. *Hamlyn* v. *Betteley*, 6 Q. B. D. 63, and *Mason* v. *Wirrall Highway Board*, 4 Q. B. D. 459, are both authorities, that a proceeding may be a cause depending in a court, and yet not be an action. An action is a proceeding commenced by writ of summons. Cause is a wider term and includes "any suit, action, matter or other proceeding competently brought before and litigated in a particular court." *Per Lord Selborne* in *Green* v. *Penzance*, 6 App. Ca. 671. *Bordieu* v. *Rowe*, 1 Scott 608, is relied on for the defendant. There an issue had been sent by the Court of Chancery to the Common Pleas for trial and a motion was made for a commission to examine a witness abroad, which was opposed, on the ground that the proceeding could not be said to be an action depending on the court. The rule was however made absolute, Tindal, C. J., saying "I think an issue out of Chancery is a cause depending on the court in which it is to be tried within the meaning of the statute." There the learned judge spoke as if cause was the expression in the statute and not action.

The later authorities seem clear that an interpleader issue is not an action, and if not, then the statute does not empower the court to grant a commission.

I therefore discharge the summons, but as commissions have been issued before in interpleader matters, I do so without costs.

Cumberland, for defendant (applicant).
Bradshaw, for plaintiff.

RE DOUGLASS.

JULY 25, 1890.] [TAYLOR, C. J.

Real Property Act—Corporation's right to hold lands.

The Deputy District Registrar for Brandon submitted the following question to the court: "Have the C. P. R. Co. power to take, hold acquire and dispose of real estate, not necessarily required for the purpose of operating their railway, situate within that portion of the Province of Manitoba known as the 'added territory,' forming part of the lands granted to it as a subsidy for the construction and operation of the railway referred to, without the license of the Lieut.-Gov.-in-Council enabling it do so: and ought he permit a transfer by the Ry. Co. to certain lots to be registered and issue a certificate of title to the transferee?"

The Ry. Co. were registered owners under a certificate of title to them.

Held—

1. That the certificate was conclusive evidence of their title as against Her Majesty, as represented by the Government of Manitoba and all persons whomsoever.

2. That no question arises under 49 Vic., cap. 11, sec. 4, as to the company's right of disposing of the land, for that was settled when the company were registered as owners.

Question answered in the affirmative.

Ewart, Q. C., for the motion.

RE THE SASKATCHEWAN COAL CO.

JULY 31, 1890.] [KILLAM, J.

Winding up Act—Liquidator's remuneration.

Application by a liquidator to have his accounts passed, remuneration fixed, and for liberty then to resign.

Held—

1. That prior to 52 Vic., cap. 32 Can., the court had no power to delegate to the master a reference to take the accounts, tax the costs and fix the remuneration.

"After careful consideration and upon consultation with my brother judges, I am of the opinion that there is no reason why higher rates of remuneration should be given in this country to liquidators than in England."

2. That until some other scale of remuneration is adopted the English rule will be used as a guide here but not as binding. *In re Mysore Reefs Gold Mining Co.*, 34 Ch., D. 14, referred to.

Remuneration allowed at the rate of $5 for an 8-hour day, and an extra amount for making out his account and for interest in moneys advanced.

Application granted.

Mulock, Q. C., for liquidator.

HOWARD v. BURROWS.

AUGUST 2, 1890.] [TAYLOR, C. J.

Solicitor's bill and capacities.

The plaintiff sued for a bill of costs as a solicitor and also for a commission of $1,000 on the purchase of a newspaper plant bought by him for the defendant.

An order was made referring the whole bill to taxation. The plaintiff denied that anything was said at the time of his employment that he was retained in the usual sense of the term, and he was not the usual attorney of the defendant. The plaintiff appealed.

Held—

That if it were clear that the plaintiff was employed as an attorney, and he in that character undertook to perform certain services and incur certain responsibility, he would have to take his choice of such remuneration as the tariff

would allow, but it is otherwise where such is not the case and the attorney should not be deprived of his right of going to trial. *In re Osborne*, 25 Bea. 353; *In re Oliver*, 15 W. R., 331; *Allan* v. *Aldridge*, 5 Beav. 401.

Appeal allowed with costs.

Mulock, Q. C., for plaintiff.

Munson, for defendant.

EDEN v. EDEN *et al.*

AUGUST 2, 1890.] [TAYLOR, C. J.

Practice—Costs where defendant answered instead of demurring.

Bill for foreclosure alleging mortgage from defendant to the plaintiff, but that one R, subsequent to the mortgage, conveyed the lands to two other defendants R. and J. as trustees, who claim to be entitled to the equity of redemption in the lands, and that defendant R. is in possession thereof. The prayer is for an order for payment, foreclosure and immediate possession. The bill was noted *pro confesso* against the mortgagor, and the other defendants answered, denying the defendant Eden's title. They allege that the latter claims through a deed from a homesteader prior to recommendation for, or issue of, patent and that deed is therefore void under 49 Vic., cap. 54, sec. 42, D. Other defences were set up and the prayer is for a declaration that the conveyance to Eden is illegal and void. At the hearing the defendants submitted to a simple foreclosure decree and the only question raised being as to the costs of the suit. The plaintiff contends that he was entitled to them, for the defendants by answering instead of demurring, have compelled him to go to a hearing at greatly increased expense. The defendants say that the bill as against them is an ejectment suit and the plaintiff not having pressed for that relief at the hearing, it is practically dismissed as against them.

Held—

1. That the plaintiff was entitled to the costs of a simple foreclosure suit.

2. That if a bill is one in which the plaintiff fails he should not have costs, and where the defendant instead of demurring, answers and the case goes to a hearing thereby putting the plaintiff to greatly increased and unnecessary costs, he may well be deprived of costs. The following cases were cited and commented upon: *Pearce* v. *Watts*, L. R. 20 Eq. 492; *Bresh* v. *Trowbridge Water Works Co.*, L. R. 10 Ch. App. 459; *Raven* v. *Lovelass*, 11 Gr. 435; *Wylie* v. *McKay*, 20 Gr. 421; *Longeway* v. *Mitchell*, 17 Gr. 190; *Kelly* v. *Ardell*, 11 Gr. 579; *Roche* v. *Jordan*, 20 Gr. 573; *Prince* v. *Lough*, 24 Gr. 276; *Nesbitt* v. *Berridge*, 32 Beav. 282; *Saunders* v. *Stull*, 18 Gr. 590; *Gildersleeve* v. *Cowan*, 25 Gr. 460.

Costs of an ordinary foreclosure suit allowed with reference to the master.

Howell, Q. C., for plaintiff.

Ewart, Q. C., and *Elliott*, for defendant.

HOWE v. MARTIN.

AUGUST 4, 1890.] [KILLAM, J.

Practice—Sheriff's interpleader—Rescinding order.

Summons to rescind interpleader order on ground that sheriff had given up possession of the goods before the trial of the issue, contrary to the terms of interpleader order.

Judgment—

The cases of *Lewis* v. *Jones*, 2 M. & W. 205; *White* v. *Binstead*, 13 C. B. 304; *Henderson* v. *Wild*, 5 U. C. Q. B. 585; *Black* v. *Reynolds*, 43 U. C. Q. B. 398, show that relief can be obtained for the action of the sheriff without rescinding the interpleader order. That order protects the

sheriff in respect of his acts prior to its being made, but not for acts in contravention of that order or in breach of duty under it. If the sheriff has improperly committed an act from which the execution creditor has suffered damage, the latter should have such relief as he may be entitled to, but the sheriff should not on that account lose the protection which the order gives in respect of his prior acts. If that order were rescinded he would be exposed to the risk of an action by the claimant as well as of the creditor. This might be a wholly excessive penalty for what the sheriff has done if the claimant be entitled to the goods. The claimant too has to be considered. He has been deprived for some period of any right of action against the sheriff, and has been remitted to proceedings under the interpleader order. He has got ready for a trial of the issue, which was entered and postponed. There is no reason why he should now be turned back to another mode of proceeding in order to establish his right of property. I dismiss the application, with costs to be costs to the sheriff and claimant at the conclusion of the interpleader proceedings in any event, but I do not allow any costs of examination of Mr. Monkman on his affidavit, a wholly unnecessary proceeding.

Monkman, for plaintiff.
Wilson, for defendant.
Howell, Q. C., for sheriff.

ONTARIO BANK v. SMITH.

AUGUST 4, 1890.] [KILLAM, J.

Practice—Commission ex parte married woman.

Summons taken out by a married woman, a co-defendant, for order for commission to examine witnesses on her behalf.

Judgment—

Upon the authority of *Pearse* v. *Cole*, 16 Jur. 214, and *McMicken* v. *Ontario Bank*, 5 Man. R. 152, I must hold that in this case the wife could not make the motion alone without a next friend. I wish, however, to guard against being understood to apply this to a case in which the plaintiff has made a married woman a sole defendant. Here the husband, also, is a defendant; he appears by the same solicitor and supports the motion. The defendant did not rely wholly on the objection named, but filed an affidavit partially directed to meeting the application and on other grounds which, therefore, I feel at liberty to consider. I am not prepared to accept the principle alleged to be laid down in *Smith* v, *Gray*, 10 Ont. P. R. 531, that in all cases the applicant for a commission or order to examine witnesses abroad must show in the first instance the nature of the evidence proposed to be given. Such has never been the rule here, and I do not think it has been so in Ontario. In the case referred to it may have been required on special grounds, though the fragmentary report appears to lay down a general proposition. The forms of affidavits for use on such applications found in the books, appear to indicate that this is not in general necessary either at law or in equity. I think that the applicant made a *prima facie* case for the order and that it should be made. I grant it as made in the joint application of husband and wife to examine the witnesses on behalf of the latter or of both, without costs to either party of this motion in any event.

Bradshaw, for plaintiff.

C. P. Wilson, for both defendants.

MULLIGAN v. DISTRICT REGISTRAR.

AUGUST 4, 1890.] [KILLAM, J.

Real Property Act—Adding pleas.

Action by party aggrieved to recover damages against the District Registrar of Winnipeg, officially, for the improper issuing of a certificate of title. The first count avers loss and expense in inquiring into the wrongful issue, and the second that the damage arose through the omission, misfeasance, and mistake of the Registrar. Pleas, not guilty, and denial of the ownership in fee simple. No specific wrongful act prior to the certificate was alleged. The defendant, before issue joined, applied to add plea: That the party to whom the certificate issued is not dead or without the Province, and that he is still within it.

Judgment—

There would have been considerable ground for argument, that the declaration is embarassing or demurrable for not shewing the omission, mistake, or misfeasance complained of, and the facts which create a bar under the act to an action under the 117th section of the Act of 1885. As, however, no objection has been taken on this ground, and as such can hardly now be open, I do not rule positively upon it, but suggest the point for the consideration of the parties in future cases.

Under the circumstances, the declaration being framed as it is, and issue not being joined, I will not take the defendant as precluded by lapse of time. I think that a defendant should have every possible opportunity to raise any reasonable defence though in many actions it is necessary to be careful that opportunity be not given to a defendant to delay or otherwise prejudice a plaintiff. Under the 119th section, the action may be brought against the Registrar only, if the person against whom it is, by

prior provisions directed to be brought, be dead, or cannot be found within the Province. Under the 120th section it can be so brought in any of the cases mentioned only, if the remedy by action for recovery of damages under former provisions is barred. The proposed pleas shew another party who might have been sued, one the person upon whose application the land was brought under the act, the other the person who acquired title through the error, omission, and misfeasance charged, and each shows that the party is alive to be found within the Province, and that the action against him is not otherwise barred. They negative therefore the conditions under which the action can be maintained against the District Registrar.

In the view which I take, they would on very slight evidence of *bona fides* be allowed to be added, even at the trial, in such an action as the present, and should be allowed now.

The order may direct the amendment to the first plea agreed upon. The plaintiff should have the costs of the motion as costs in the cause.

The amendment may be made in vacation and the defendant should be limited as to time in making it.

It desired, as the plaintiff may have delayed joining issue pending the application, he may do so also in vacation.

Amendment allowed.

C. P. Wilson, for plaintiff.

Davis, for District Registrar.

N. W. TERRITORIES.

RE CLAXTON.

JULY 15, 1890.] [FULL COURT.

Judgment debtor—Exemption Act.

Question of validity of s.s. 9, s. 1, cap. 45 Rev. Ord. N. W. T., allowing execution debtor exemption of 160 acres as homestead, reserved by Rouleau, J., for the full court.

Held—

That s.s. 9 of s. 1 of cap. 45, Rev. Ord. N. W. T. is *ultra vires* as conflicting with cap. 53 R. S. C.

Present—RICHARDSON, MACLEOD, ROULEAU, MCGUIRE and WETMORE, JJ.

REGINA v. KEEFE.

JULY 15, 1890.] [FULL COURT.

Conviction by J. P. under sec. 5 of cap. 38, Rev. Ord. N. W. T., for gambling.

The question of the validity of section 5 was raised on appeal from conviction before Rouleau, J., and reserved by him for the opinion of the full court.

Held—

That sec. 5, cap. 38, Rev. Ord. N. W. T., is *ultra vires* as constituting a criminal offence, and consequently being beyond the powers of the Legislative Assembly of N. W. T.

Conviction quashed.

Scott, Q. C,, for Crown.

E. P. Davis, for appellant.

Present—RICHARDSON, MACLEOD, ROULEAU, MCGUIRE and WETMORE, JJ.

THE

WESTERN LAW TIMES.

NOTES OF RECENT DECISIONS.

MANITOBA.

MERCHANTS BANK v. GALBRAITH, AND BATHGATE, CLAIMANT.

JULY 12, 1888.] [BAIN, J.

Interpleader—Examination of married woman as judgment debtor.

An interpleader issue having been decided against the claimant, and judgment having been signed for costs, the execution creditor applied by way of summons for an order to examine the claimant, a married woman, as a judgment debtor.

On return of summons counsel for claimant contended that such an order could not be made under Ad. Jus. Act, sec. 52, on the grounds that the judgment was for costs only; and that the claimant being a married woman could not be examined under the act as a judgment debtor.

Held—

That without deciding the question as to the examination of a married woman, the order could not be made, the judgment being for costs only.

Summons dismissed with costs, to be set off against the judgment.

Phippen, for execution creditor.

Crawford, for claimant.

EMPIRE BREWING COMPANY v. HARLEY.

JUNE 23, 1890.] [THE REFEREE.

Ex juris writ—Summons to set aside judgment.

The defendant was sued in this Province upon a cause of action which arose without. He is a non-resident. Insurance money to which he was entitled to the extent of $600 was garnished, and the money was within this Province. The plaintiff did not get leave to serve the writ, but after service, obtained an order for leave to proceed. The defendant moved to set aside this order and the judgment recovered thereunder. 49 Vic., cap. 35, sec. 32, sub-sec. *e* referred to.

Judgment—

This is an application on behalf of the defendant to set aside an order made by me dated May 28, and all proceedings taken thereunder on a number of grounds. The important ones are :

1. That the order is irregular, the plaintiff should have obtained an order allowing service of the writ, which should be served with the writ and then in case of non-appearance within the time limited, an order to proceed would go as under the old practice, except that it would provide that the plaintiff must declare on contract or judgment. The defendant is right in this contention but as the practice on this point has never been clearly laid down, and the defendant cannot be prejudiced by this order, I will instead of setting aside or amending the order, allow it to stand ; and give the defendant an additional time, say 8 days from this order, to plead to the declaration herein.

2. The defendant further says that the order allowing service should not have been made, or that it should now be set aside, because the defendant has no assets in Manitoba, the affidavits show that the defendant lives in Regina, that he insured his goods and chattels there with The Commercial Union Insurance Co. for $1,500, that on March 15, 1890, the property insured was destroyed by fire, that on February 28, 1890, the defendant pledged these goods and assigned this policy to J. Akin to secure the sum of $400, and that he is now the *bona fide* holder thereof. The head office of the company is at London, Eng. The plaintiffs have served on the company's agent here, an order attaching the sum of $600, and that sum is now in his hands awaiting the result of this action. The question is under these circumstances, has the defendant assets within this Province?

The fact of the $600 being now in this Province gives the defendant a right of action against the company in this court and I can see no reason why the debt of the company to the defendant cannot be attached in this court. *Purvis* v. *Slater*, 11 P. R. 507, decides that if the debt may be attached to answer the judgments of a defendant the Court has jurisdiction to entertain an action against him. That is the position here, the assignment makes no difference in the situation as from the defendant's evidence it is clear that he is entitled to at least $200 of the insurance money and I must hold that the defendant has assets within this Province, and that an order allowing service of the writ could properly be made in this case and should stand. As both parties have succeeded on the different points argued I will give no costs to either side.

Summons dismissed without costs.

Elliott, for plaintiffs.

C. P. Wilson, for defendant.

NICOL v. RYAN.

AUGUST 25, 1890.] [TAYLOR, C. J.

Appearance to writ—Attachment—Waiver of right to move against order.

Plaintiff issued writ of attachment against defendant on the ground that he was about to transfer or dispose of his real and personal estate with the intent of defeating, delaying or defrauding his creditors, and the plaintiff in particular. Defendant entered an appearance and then took out a summons to set aside the order upon which the writ issued, the writ itself and the copy and service thereof, on the following grounds: That the affidavit upon which the order was obtained was untrue; that the defendant did not depart from the Province with intent, etc., alleged, and that the defendant did not intend to dispose of or transfer his property for the purpose of defeating his creditors, etc.

Counsel for plaintiff, before filing any material, raised the objection that the defendant by having appeared to the writ could not now move to set same aside, quoting Adm. J. A. secs. 36 and 38, and citing *Drake on Attachment*, secs. 112, 144 and 414; *Scott* v. *Mitchell*, 8 Prac., 518; *McGuffin* v. *Cline*, 4 Prac., 137; *Archbold's Practice*, 793–796 and 1473; *Moran* v. *Palmer*, 13 U. C. C. P., 450; and others.

Held—

That the defendant by so appearing had waived his right to make such application.

Summons dismissed with costs.

Crawford, for plaintiff.
Gilmour, for defendant.

MAHON v. FLUMMERFELT.

AUGUST 29, 1890.] [THE REFEREE.

Transcript of judgment—Execution.

Summons to set aside an execution issued immediately after signing judgment in the Queen's Bench on transcript from County Court.

Held—

A judgment may be signed by default at the expiration of ten days from service of the writ, in a County Court suit, and a transcript may be obtained immediately and judgment signed thereon in the Queen's Bench, and execution issued forthwith.

Summons to set aside execution dismissed with costs.

Cumberland, for defendants.

Pitblado, for plaintiff.

NORTH-WEST TERRITORIES.

STOBART v. SHOREY.

JUNE 10, 1890.] [FULL COURT.

Preferential judgment—Rights of assignee thereof.

R. in insolvent circumstances, allowed G. J. R., his mother, to obtain judgment. Stobart, Sons & Co. (appellants), and other creditors subsequently obtained judgment against R. and issued execution. Appellants sought to impeach the judgment of G. J. R. in an interpleader issue, but subsequently took an assignment of her judgment and abandoned the interpleader. Respondents obtained verdict, ante Rouleau J., setting aside judgment as fraudulent

and void on ground that no money was ever advanced by G. J. R. to R., and that said judgment so assigned was fraudulent and void in the hands of appellants as against R.'s creditors.

Held—

That the judgment was fraudulent before the assignment, which latter did not prevent its impeachment by the creditors. A "judgment" is not within 13 Elizabeth, sec. 6, making good a *bona fide* purchase without notice.

Judgment of Rouleau, J., affirmed.

Present—RICHARDSON, MCLEOD, ROULEAU, WETMORE, and MCGUIRE, JJ.

THE

WESTERN LAW TIMES.

NOTES OF RECENT DECISIONS.

MANITOBA.

GRANT v. HUNTER.

[Reported ante pp. 36 and 37. The word "caveator" on line 17, p. 37, should be "caveatee." "Caveator" appeared in the judgment, but subsequent to our issue this clerical error was discovered and altered in the original MSS. Ed.]

WINNIPEG AND HUDSON'S BAY RY. v. MANN, *et al.*

Oct. 7, 1890.] [Taylor, C. J.

Railway Acts—Power of railway company to pledge bonds—Effect of bonds wrongly charging land grant—Definition of term "raising money.

The facts of this case will be found substantially stated on the motion to continue injunction reported ante p. 24 et seq. The injunction was then dissolved as to part of the bonds, the subject matter of the suit, and thereupon 29 of them were delivered by the Imperial Bank to the other defendants, leaving 48 still deposited there to abide the result of the hearing. The learned judge delivered a very

lengthy and elaborate judgment dealing in great measure with the exceptionally complicated state of facts at issue.

Held—

1. That the contractors had completed the construction of the forty miles of railway, and that certain small omissions amounting to $275.00 on a $460,000.00 contract were not material.

2. That a recital in Can. Stat. 50 and 51 Vic., c. 81, D, that "the company has constructed and completed forty miles of the railway thereby authorized" and another in Man. Stat., 50 Vic., c. 40, that "the company have completed forty miles of the said railway" while not conclusive, are yet to be regarded to some extent as evidence that the matters recited are true. *Rex* v. *Green*, 6 A. & E. 548; *Rex* v. *Haughton*, 1 E. & B. 501.

3. That even assuming that the bonds were not a valid charge upon the land grant of the company—which could not be done under Can. Stat., 43 Vic., c. 59, s. 13, D., as amended by 47 Vic., c. 70, s. 3, D., and 49 Vic., c. 73, s. 5, D.—although expressed to be such a charge, yet such charge being something entirely distinct and separate from the rest of the charge on the company's property following the words of the above cited clauses, the bonds were not on that account void.

By Can. Stat., 43 Vic., c. 59, s. 13, D., as amended by 47 Vic., c. 70, s. 5, D., the directors have power "to issue and sell or pledge all or any of the said bonds . . . . for the purpose of raising money for the prosecution of the said undertaking." It was objected that the bonds here were not pledged or dealt with "for the purpose of raising money;" and further that the president had no power to execute the contract, by which double the amount of bonds being deposited, the liability of the company was doubled. A by-law (No. 38) authorized him to "sell or pledge the same at such price or prices and upon such terms and con-

ditions as he shall see fit." The company at the time was absolutely without money. The contractors were not only to do the work, but were to advance money for everything which should properly have been provided for by the company for the construction of the railway. There was no evidence to show that the president could have sold the bonds, or otherwise secured the construction of the road, which it was of the utmost importance to have done at once.

Held—

1. That the expression "raising money" should be given a liberal construction and that the president had the power to pledge the bonds under the authority of the directors above given. "I cannot see that the present transaction, using the bonds as was done here, for the purpose of securing the construction of the railway was not really a raising money for the prosecution of the undertaking." *Hulett's Case*, 2 J. & H. 306; *Howard* v. *Patent Ivory Co.* L. R., 38 Ch. D. 156; *Re Inns of Court Hotel Co.*, L. R. 6 Eq, 82; *Landowners West of Eng. etc. Co.* v. *Ashford*, L. R., 16 Ch. D. 411, referred to, and *Chambers* v. *Manchester and Milford Ry. Co.*, 5 B & S., 588, distinguished.

The abdication by the directors and shareholders of a company of corporate powers in favour of the president discussed and commented upon.

2. That under the above circumstance the president had the right to pledge the bonds at 50c. on the $1.00 even if the liability were doubled. *Regents Canal Iron Works Co.* L. R., 3 Ch. D. 43; and *Whitehead* v. *Buffalo* and *L. H. Ry. Co.*, 7 Gr. 351 and 8 Gr. 157 (in appeal) approved of. The finding in the latter case, as to presumed knowledge of shareholders and directors of the acts of the president of a railway for the construction of such company, approved and followed.

Bill dismissed as against all defendants with costs.

Howell, Q.C., and *Tupper*, Q.C., for plaintiffs.
Ewart, Q.C., and *Munson*, for defendants M., H. & R.
McLeod, for defendants the Imperial Bank.

RE ALLAN.

OCTOBER 13, 1890.] [TAYLOR, C. J.

Land Titles Act—Reference by registrar—Municipality buying in lands —Assignment of certificate—Notices.

Reference by District Registrar at Portage la Prairie, under s. 120, Real Property Act, 1889. A municipality sold certain lands within its limits, for taxes then due under Mun. Act of 1886, and amendments, and having bought in the lands at the sale, assigned the tax certificates to N. (who subsequently obtained tax deed) for a greater sum than they had paid for the lands. N. conveyed to applicant for title. No interest was charged upon the taxes. The applicant demanded under s. 55, R. P. A., 1889, from the District Registrar, notices for service upon all persons, who except for such tax sale deed, would have been interested in the lands.

Query submitted: Was the tax sale deed validly issued, and if so, does it come within the provisions of s. 673 of Municipal Act, 1886 as amended, or s. 155 of the Assessment Act, and should service of said notices be permitted?

Held—

1. That the deed comes within s. 155, which is the same as s. 673 as amended by 50 Vic., cap. 10, s. 52.

2. That under sections 656 (as amended), and 671 of the Municipal Act, 1886, the municipality had the right to buy in the lands as above stated and assign the certificate. "Surely the purchaser is an assignee of the municipality, the purchaser at the tax sale, and under the terms of s. 671 entitled to demand and receive a deed, which when issued to him would have the same effect as a tax

sale deed issued to the assignee of any other purchaser at a tax sale."

Direction that the applicant should receive notices for service.

Coutlee, for the applicant.

No one appearing for the Atttorney-General, or the municipality, although notified.

WATEROUS v. JONES.

OCTOBER 14, 1890.] [FULL COURT.

Statute of Frauds—Written guarantee.

The plaintiffs sued the defendant upon a written guarantee in these words :

High Bluff, Septr. 1st, 1887.

I, James P. Jones, Thresher, hereby agree to become responsible *for the debt contracted by James Jones to the Waterous Engine Works Co'y, Ltd., of Winnipeg*, the said debt being past due notes and accounts and interest due on the Champion Engine and Separator purchased by him the said James Jones and C. Neelands under the terms and conditions of their the said Waterous Engine Works contract and agreement, all of which terms and conditions I hereby agree to abide by.

Witness—Geo. Erb. JAMES P. JONES [Seal].

Held, per KILLAM, J.

That the plaintiffs could not sue upon the alleged agreement as a covenant, not being named therein as covenantees —there not being sufficient mention of the plaintiffs, or of the time where the agreement was to be performed and hence within the Statute of Frauds.

Verdict for defendants.

A. E. McPhillips, for plaintiffs.

Culver, Q.C., and *Cooper*, for defendants.

The plaintiff appealed.

Held—

1. That from the wording of the instrument the meaning must be that the defendant became responsible to some one not named for James Jones debt, but if the plaintiffs

are named in the instrument, and without doing much violence to the rules of construction, it may be read to mean that the defendants became responsible to them. *Williams* v. *Lake*, 29 L. J. Q. B. 1, distinguished.'

2. That evidence of the surrounding circumstance will be looked at in the case of guarantees to enable the court to ascertain the meaning of an ambiguously worded instrument. *Newell* v. *Radford*, L. R. 3 C. P. 52; *Heffreed* v. *Meadow*, L. R. 4 C. P. 595; *Vandeburg* v. *Spooner*, L. R. 1 Ex. 316.

Appeal allowed with costs.

Ewart, Q.C., and *McPhillips*, for appellants.

Culver, Q.C., and *Cooper*, for defendants.

Present—TAYLOR, C. J., DUBUC and BAIN, J J.

CAN. PAC. RY. CO. v. MUNIC. OF CORNWALLIS.

OCTOBER 15, 1890.] [FULL COURT.

Tax sale—Unpatented lands—Payment of money under duress—Right to recover same.

Appeal by defendants from decision of Bain, J., reported *ante* p. 48, which see for facts.

Held—

1. That the plaintiffs lands are exempt from taxes from the date of the contract, and continuing from that time for a period of twenty years after the issue of the patent unless sooner sold or occupied. *Yazoo & Mississippi Ry.* v. *Thomas*, 10 U. S, 74, considered and not followed.

2. That the payment made by the company was not a voluntary one, but one under compulsion. "The right to recover back moneys so paid is not limited to the case of payments under *duress* as to the person or goods of the party paying, but is applicable to the case of real estate," *Close* v. *Phipps*, 7 M. and G. 586; *Valpey* v. *Manley*, 1 C. B., 594; *Morgan* v. *Palmer*, 2 B. and C., 729; *Parkes*

v. *Great Western Ry. Co.*, 7 M. and G., 523 ; *Fraser* v. *Pendlebury*, 3, L. J. C. P., 1.

3. The bare extstence of a tax deed or certificate, even if it "amounted to nothing," was yet a cloud upon the plaintiff's title, and the danger of such deed or certificate issuing was sufficient pressure to make the payment a compulsory one, and illegally assessed taxes so paid are recoverable. *Street* v. *Simcoe*, 12 C. P., 284, approved of, and *Benjamin* v. *Corporation of Elgin*, 26 U. C. R., 660, distinguished. *Erskine* v. *Van Arsdale*, 15 Wall, 75 ; *Boston & Sandwich Glass Co.* v. *Boston*, 4 U. S., 181 ; *Joyner* v. *School District*, 3 Cush., 567 ; and *Bradford* v. *Chicago*, 25 Ill., 349, cited approvingly.

4. That the defendants were also liable for that portion of the taxes collected by them as mere agents for the Judicial District and School Rates, and paid over to the same. "Although mere agents, they may be and are liable to refund." Following *Steel* v. *Williams*, 8 Ex., 632,

Motion to set aside verdict dismissed with costs.

Killam, J delivered a dissenting judgment.

Ewart, Q. C., and *Tupper*, Q. C., for plaintiffs.

The Attorney General for defendants.

Present—TAYLOR, C. J., DUBUC and KILLAM, J J.

PRACTICE.

BRYAN v. FREEMAN.

OCTOBER 8, 1890.] [DUBUC, J.

Practice—Capias.

Summons to set aside an arrest under a *capias ad respondendum* and subsequent proceedings. 48 Vic., c. 17, sec. 76, provides "that no writ of *capias* to arrest . . . shall be issued for a cause of action less than one hundred dollars, but such writ may be issued when the cause of action exceeds that sum." The plaintiffs original cause of action was only $81.50, but he obtained an additional $50.00 by assignment. The other facts can be ascertained from the judgment.

Held—

1. That the fact that the defendants name was given as Daniel F. Freeman in the affidavit to hold to bail and in the *capias.* and as Daniel Foster Freeman in his own affidavit was not fatal. *Bilton* v. *Clapperton*, 9 M. & W. 473; *Anderson* v. *Johnson*, 6 Man. R. 113.

2. That the court will not interfere where the cause of action is not sufficiently stated, unless it is very clear that the plaintiff has no cause of action. 1 *Pegler* v. *Hislop*, 1 Ex. 437; *Delisle* v. *Degrand*, 3 Pr. R. 105; *Cousin* v. *Bullen*, 6 Pr. R. 71; *Willet* v. *Brown*, 8 Pr. R. 468.

3. That an account duly assigned is a sufficiently good claim to obtain a *capias* when the other particulars of the case would justify it.

Summons dismissed with costs.

C. P. Wilson for plaintiff.

Cassidy, for defendant.

REGINA v. STARKEY.

OCTOBER 14, 1890.] [KILLAM, J.

Certiorari—Supersedeas and procedendo—New application—Costs.

Counsel for defendant moved absolute rule *nisi*, filing the writ of certiorari granted herein (*ante* p. 88) and the return thereto, comprising the conviction and all proceedings.

It was objected that it was not shown upon this motion that a recognizance for costs had been entered into pursuant to 53 Vic,, cap. 2, sec. 40.

Urged in reply that such was shown by the fact of the production of the writ, which could not have been granted, as appears by above section, unless recognizance had been entered into, which in fact was the case, and that in any event defendant was at liberty to show that fact by affidavit, now, upon the motion.

Held—

The objection was fatal.

Rule dismissed.

The question of costs. and motion for a *procedendo* was afterwards argued. Defendant's counsel contended that as this was a criminal matter, and prior to the statute of Geo. II providing that defendants moving against convictions should give recognizances for costs, no costs could be granted, which was the reason for passing that statute. Here the objection to the rule is that there is no recognizance, and it is so held. Therefore no costs can be granted. The power to grant costs, arises by reason of the the existence of the recognizance only. The prosecutor cannot ask for costs out of a recognizance of which he denies the existence. The conviction cannot be proceeded with because the conviction goes to therule *nisi* only, leaving the certiorari untouched, and the defendant should have leave to make a new motion.

Judgment—

I have already expressed my reasons for discharging the rule. I think that this should be done without prejudice to a further application, and that the certiorari should not be quashed or superseded. The application has never been determined upon the merits. It is very like the cases in which an application has been dismissed on account of technical defects in material which prevented its being used. I notice that in the late case of *Regina* v. *Petrie*, 1 N. W. T. R. 3, in which the Supreme Court of the North West Territories discharged a rule *nisi* to quash the conviction under a similar enactment and similar circumstances, a new rule *nisi* was at once issued upon the requisite security being furnished.

After consideration of the authorities cited in the *Queen* v. *Clement*, 10 Ont. R., 158, notwithstanding the remark of Fidd, J. in *Regina* v. *Lee*, 92 B. D., 394, I think that I have jurisdiction to grant costs, which I do accordingly.

Mulock, Q. C., for the convicting justices.

Cassidy, for the defendant.

THE

WESTERN LAW TIMES.

NOTES OF RECENT DECISIONS.

MANITOBA.

ROWAND v. MARTIN.

OCTOBER 17, 1890.] [BAIN, J.

Award—Biased arbitrator.

For facts, in part, see notes of cases, p. 28 and 38 ante. The bill was filed herein to set aside the award on the grounds of partiality and misconduct on the part of the Railway Commissioner (through his agents), and of the third arbitrator. This was the hearing. It appeared that the third arbitrator, or referee, had been employed by the defendant previously to make valuations of similar and adjacent lands, taken for the same purpose. His name was given by the Railway Commissioner's attorney, with a number of others, to the plaintiff's attorney, and the latter assented to his being chosen as referee.

Held—

1. That his previous valuations, which in a sense prejudged the question in dispute, would tend to bias his judgment in the arbitration, seems to be self-evident, and this being so, the award cannot stand. *Kemp* v. *Rose*, 1

Giff., 250; *Dobson* v. *Gross*, 6 Q. B., 637; *Conmee* v. *C. P. R.*, 16 O. R.

2. That sec. 31, Railway Act, Man., 1881, does not apply to a third arbitrator.

Kennedy, Q.C., and *Culver*, Q.C., for plaintiffs.

Cameron, and *Mathers*, for defendant.

REGINA v. HOMARD.

French speaking jury.

OCTOBER 30, 1890.] [DUBUC, J,

The prisoner, a Belgian, speaking only French, notwithstanding any legislation that may have been passed by the Province of Manitoba, is still entitled to a jury one-half skilled in the English language, and one-half in the French, if he so desires, under Cap. 167, R. S. C.

Cameron, for Crown.

Howell, Q. C., and *Prendergast*, for prisoner.

ARCHIBALD v. MUNIC. OF YOUVILLE, *et al.*

NOVEMBER 3, 1890.] [BAIN, J.

Injunction to restrain issue of tax deed.

Bill filed for an injunction to restrain the municipality from issuing tax deed. It alleges that they bought a half-breed grant on April 30, 1888, from a third party, situate in the above municipality; that the municipal treasurer certified that on the above date there were no taxes in arrear; that on July 30, 1890, the defendant municipality claimed that taxes, properly assessed and levied, were in arrear upon the lands for 1883, *et seq.*, and offered them for sale for taxes by public auction, and that a co-defendant bought them; that the lands were exempt from taxation prior to 1889, and that even if they were so liable, that the municipality did not in any of the years for

which taxes are claimed, ever assess the lands or pass any by-law levying a rate. It was not alleged that the statutory certificate of sale had issued.

Prayers: That the sale may be declared illegal and void, and that defendants may be enjoined from permitting their corporate seal to be affixed to the usual deed. Demurrer by the municipality on the ground that the sale having once been made, they have nothing further to do with the matter, and that if, as the bill alleges, the sale was wholly null and void, the court will not interfere. *McLellan* v. *Assiniboia*, 5 Man. R., 25.

Held—

1. That the deed would be wholly null and void on the facts set out, and not being registered, the court would not under ordinary circumstances interfere to set it aside, and even if registered it is questionable whether the court would interfere. *McRae* v. *Corbett*, 6 Man. R., 426; *Buchanan* v. *Campbell*, 14 Gr., 163; *Hind* v. *Billington*, 6 Gr., 149; *Truesdell* v. *Cook*, 18 Gr., 532; *Dynes* v. *Bales*, 25 Gr., 593; *Ont. Ind. Loan Co.* v. *Lindsay*, 3 Ont., 473; *Weir* v. *Maguire Grape Co.*, 11 O. R., 700; *Blair* v. *Smith*, 1 Man. R., 5.

2. The act of a municipal corporation, in such a case, differs from that of a private individual illegaly assuming to sell lands that belong to another. Such proceedings on the part of a corporation, no matter how illegal they may be, cannot fail seriously to embarrass and prejudice the owner of the lands in which the taxes are claimed. *C.P.R.* v. *Calgary*, 5 Man. R., 38; *Hannewinkle* v. *Georgetown*, 15 Wall., 547; *Dows* v. *Chicago*, 11 Wall., 108; *Heywood* v. *Buffalo*, 14 N. Y., 534.

3. That—apparently—citing with approval, *Heywood* v. *Buffalo*, *supra*, the bill should distinctly and plainly allege that the proceedings were apparently within the powers of the council and upon their face valid and created

a valid lien, and also that notwithstanding such apparent validity the proceedings were void by reason of certain extrinsic matters which could be established only by other evidence.

4. That the proceedings in this case are not valid on their face, and that the illegal sale cannot be considered to be a cloud upon the title in the sense in which the term is used in the above authorities.

Demurrer allowed with costs.

Howell, Q.C., for plaintiffs.

Phippen, for defendants.

[NOTE.—An appeal has been entered herein.]

BERNARD v. TETU.

Nov. 15, 1890.] [ARDAGH, C. J.

Exemption of household goods—Waiver.

The facts appear from the

Judgment—

Plaintiff is a judgment creditor of the defendant, and has had seized under an execution, certain chattels of the latter, consisting of household furniture under the value of $500.

The furniture was found in the possession of an auctioneer, to whom the judgment debtor had consigned it to be sold, and who had accordingly advertised the proposed sale.

The defendant claims that the property is exempt and the question is referred by consent without the usual formality of an interpleader.

The question seems to turn upon the construction of sub-sec. 1 of s. 117, A. J. A., 1885, which exempts from execution "the bed and bedding in the common use of the judgment debtor and his family and also his household furniture and effects, not exceeding in value the sum of five hundred dollars."

For the creditor it is contended that the expression in the "use of the judgment debtor" applies to the furniture and effects as well as to the bed and bedding, and for the latter it is claimed that the words are not intended to be so applied, but that the exemption of the furniture to the extent named is absolute whether it be in use or not.

The decisions on the point are, for the most part, American and appear to bear in the direction of the debtor's right to dispose of exempted property or deal with it as he sees fit. I find, however, a reference in the American Digest to a case where it was held that sending goods to an auction room was a waiver of exemption, but I cannot find the report or anything beyond this bald statement.

I am disposed to agree with this holding and with the contention of the plaintiff's counsel as to the meaning of the sub-section quoted above. I understand it to mean that the bed and bedding in the common, that is, every day, use of the judgment debtor *and his family*, is to be exempt whatever may be its value, but that he shall only be entitled to have in use, against the claim of his creditors, other household furniture and effects to a certain limited value.

If a debtor were to send all his household furniture and effects to a storehouse, including beds and bedding and went to reside in a boarding house or an hotel, or sent them all to a sale room, could it be reasonably held that the beds and bedding were liable to exemption and the remainder of the effects to the value of $500 were intended to be exempt? This would seem to be reversing the object which the legislature apparently had in view. To take a debtor's bed and bedding in the use of himself and family for any debt has always been esteemed a great cruelty, and they are the last articles which a householder would be willing to part with, but they have to be in common use in order to be protected as an exemption.

A debtor who sends his exempted effects to be stored or sold, but who takes them back into actual use before seizure would probably come again within the protection of the Act, but I think that the act, at least, of parting with them for the purpose of sale, is a waiver of the present right of exemption, and that after the writ is executed or seizure made, the waiver cannot be withdrawn at the option of the debtor.

Elliott, for plaintiff.

McPhillips, for defendant.

BARBER v. PROUDFOOT.

NOVEMBER 30, 1889.] [FULL COURT.

Real Property Act—Validity of deed of infant's land under 41 Vic., Cap. 7—Issue—Variance of terms of sale under order.

Application for certificate of title under Real Property Act, by holder under a deed of bargain and sale, of certain lands, dated July 19, 1890, executed by a father and next friend under Q. B. order, in pursuance of 41 Vic., c. 7 and amendments, for the sale of an infant's lands for maintainance and education. The plaintiff, the half-breed allottee filed a caveat and petition thereon. An issue was directed to try validity of said deed. The original order authorizing sale could not be found. What purported to be a copy, but unsigned by the master, appeared in the order entry-book in the master's office in the usual form of such orders. The petition for sale, however, had endorsed on the back a fiat in the handwriting of Chief Justice Wood, as follows: "Let order go for sale for five hundred dollars on filing a deed or declaration of trust by the father for the infant.

Dated 16th July, 1880.

(Sd.) E. B. WOOD, C.J."

The evidence went to show that the father, after filing the declaration, sold the land, not for $500.00, as was

expressed in the deed, but in reality for a portion in cash and the balance in certain chattels. At the trial on July 23, 1889, Justice Killam entered a verdict for plaintiff, delivering a written judgment. The caveatee appealed.

Judgment, per TAYLOR, C. J.

I quite agree with the judgment of my brother Killam, that on the case made here, there can be no presumption of any other order than such as would be authorized by the fiat endorsed on the petition, and that would be only such an order as is in accordance with the prayer of the petition. Plainly by what is contemplated in, and proposed by the petition, is a sale of the infant's lands for money to be used for her maintenance and education, not an exchange for other land, for chattels of any kind, or an embarking in trade. The transaction carried out between the infant's father and Conklin was not such a one as was warranted by the prayer of the petition or by the fiat, so there was no legal transfer of the land. *Williamson* v. *Berry*, 49 U. S. 495, is a direct authority against such a transaction as took place here being a sale. The infant did not sign the deed. There is no evidence that she knew how the transaction was carried out, nor is there any evidence of possession having ever been taken by the purchaser. The first notice, so far as appears, she had, was being served with notice of the proceedings under the Real Property Act, so no delay or laches can be attributed to her. The main question is, does the statute of 1885, 48 Vic., cap. 30, sec. 1, validate the deed here. I cannot see how it does. The Act provides that where lands have been sold or where a sale has been ordered by an order, fiat, or decree of this court or a judge, and where the conveyance of such lands has been executed, etc., such sale, vesting order, or decree, and every of them, shall be valid and binding notwithstanding every defect, irregularity or omission in the carrying out and completing of the same. But where a fiat or

order has been made for a sale, and some other thing is done and carried out under it, the statute can never be said to validate that. The object of the statute is to cure defects, irregularities and omissions in connection with the doing of something authorized by the court to be done, not to validate proceedings wholly unauthorized, and the appeal should be dismissed with costs.

Kennedy, Q. C., and *O'Reilly*, for plaintiff.

Cassidy, and *Chaffey*, for defendant.

Present—TAYLOR, C. J., DUBUC and BAIN, J J.

PRACTICE.

DOWNS v. CAMPBELL.

OCTOBER 11, 1890.] [TAYLOR, C. J.

Real Property Act—Allegations in petition—Caveat.

Judgment—

An objection is taken to the petition because it contains no allegation that the caveat filed with the District Registrar was supported by an affidavit or statutory declaration as required by the Real Property Act of 1889, s. 130, s.s. 8. It does allege that on a day named "the caveator filed a caveat in the prescribed form." That seems to me sufficient. The Act requires such an affidavit, and when there is such an allegation as is found here it may properly be assumed, in the absence of evidence to the contrary, that the requirements of the Act have been complied with. In *Clarke* v. *Scott*, 5 Man. R. 281, it was argued that the petition should show the date of filing the caveat, that it might

appear that the proceedings were taken within sufficient time to prevent the lapsing of the caveat, but it was held that it was for the party opposing the petition to show that the caveat had lapsed, if it had in fact done so. In *McArthur* v. *Glass*, 6 Man. R. 224, the caveat and affidavit were before the judge and it was found that they did not contain a statement which was imperatively required by the statute. The learned judge dismissed the petition saying that the filing a caveat that complies with the directions of the statute is a condition precedent to the Court having any jurisdiction in the matter. Here the filing of a caveat in the prescribed form, that is containing what the statute requires, and supported as required, is alleged. If that is not the case then it should be shown it is not. The objection is overruled.

Cumberland, for caveator.

McPherson, for caveatee.

RE THIBAUDEAU.

OCTOBER 17, 1890.] [ARDAGH, SURROGATE JUDGE.

Probate copy.

An exemplification of Probate purported to give a copy of the original will under seal. The certificate was to that effect. The original will at the end was marked apparently by the testator—"(Signé) A. Thibaudeau."

Held—

What purports to be a copy of the will in the exemplification, or rather in the probate, evidently is a true copy. The testator cannot be supposed to have written the word "signé" before his own name, and this word being so placed would indicate that the document was a copy of a copy. This is a common error on the part of registrars and officials which causes them to certify to what is untrue. When a document is given as a true copy it is unnecessary

and improper to write the word signed before an original name.

Exemplification rejected.

Prendergast & Huggard, Solicitors for applicant.

LAFFERTY v. SPAIN.

OCTOBER 23, 1890.] [TAYLOR, C. J.

Appeal—Effect of Rule 101—Irregular demands.

Appeal from order of Referee directing an attorney to declare in writing to the defendants attorney, within one day, the profession, occupation, or quality, and place of abode, of the plaintiffs, and staying proceedings until one day after the making of the declaration. It was objected that there was no evidence before the referee that the attorney was the plaintiffs attorney, or had any connection with the action. The C. L. P. A. 1852, sec. 5, provides that every attorney whose name is endorsed on a writ shall on demand in writing made by or on behalf of a defendant declare forthwith whether such writ has been issued by him or with his authority or privity, and then goes on to provide that if he shall answer in the affirmative he shall also, in case the court or judge shall so order and direct, declare in writing within a time to be allowed, the profession, occupation, or quality and place of abode of the plaintiff. No demand was made as to whether the writ was issued by him or with his authority or privity. The only evidence was an affidavit made by a partner of the defendant's attorney, "that the two notices annexed were served on the plaintiff's attorney, and that the plaintiffs have not complied with the demands in these notices." The notices were a demand of the profession, place of abode, etc., and also, one for security for costs. They were addressed to ————, Esq., plaintiff's attorney, and on each there is endorsed, "Service hereof admitted on date, ————, plff's atty." The name of the attorney was

given in the blank space. There was no proof of his handwriting on the admissions. Rule 101 as to verification of admissions, etc., by affidavit not being necessary, was cited.

Held,—

1. That the rule extends no further than saying that for proving the particular document to have been served, no affidavit is required.

2. That in view of the liability to commitment for contempt if the order were not obeyed, that the mere production without anything more, of a piece of paper on which some person, it may be a clerk of his and it may not, has signed his name to an admission of service is sufficient to make such an order against him.

Appeal allowed on usual terms.

A. J. Andrews, for defendant.

Bonnar, for plaintiff.

McDONALD v. CHARLEBOIS.

OCTOBER 30, 1890.] [TAYLOR, C. J.

Injunction—No certificate of state of cause—Waiver.

Motion to continue an ex parte injunction, granted to October 30, 1890, from that date until the hearing pursuant to leave reserved. On an allegation that the defendant resided abroad, and that S. was his agent in this Province, the order contained a clause that the plaintiffs' should be at liberty to serve the defendant with an o. c. of the bill, and a notice of motion to continue the injunction by serving ing S., and that such service of an o. c. of the bill properly endorsed should be deemed personal service on the defendant. The notice of motion served was "that by leave, etc., a motion will be made on behalf of the plaintiffs on etc., for an order continuing the injunction this day granted or that an injunction may be issued in accordance with the prayer of the plaintiff's bill, until the hearing."

It was objected by the defendants that no certificate of the state of the cause was filed on obtaining the ex parte injunction. Leave was given to serve a notice of a motion returnable on this day to continue the injunction, but in addition to serving the writ of injunction, which restrained the defendant until that day, with leave to move to continue it, an independent and separate notice of motion which asks that an injunction may be issued in accordance with the prayer of the bill has been served. An objection was also raised as to the sufficiency of the evidence upon which substitutional service was allowed.

The plaintiffs contended that filing a certificate of the state of the cause on an ex parte motion for injunction is not necessary except when the motion is made in vacation. The evidence of the defendant being abroad was sufficient but in any event a demand on behalf of the defendant for office copies of the plaintiff's affidavits has been served which is an admission of his having received notice of the motion and a waiver of any irregularity.

The registrar was present in court when the first motion was made.

Held—

1. That a certificate of the state of the cause was unnecessary. *Dan. Pr.*, p. 1520, 1890.

2. That the effect of asking something more than the mere continuance of an injunction already granted does not vacate it.

3. That the service of the demand for copies of the affidavits is a waiver of any objection to the mode of service of the defendant.

Objections overruled.

Ewart, Q.C., and *Nugent*, for plaintiffs.

Culver, Q.C., and *Daly*, for defendants.

BARRETT v. WINNIPEG.

NOVEMBER 3, 1890.] [KILLAM, J.

Quashing by-law—Discretion.

Application by plaintiff, a Roman Catholic, to quash a public school by-law imposing a rate, on the ground that privileges guaranteed under the B. N. A. and the Manitoba Act as to separate schools, were infringed. The application was made under Municipal Institutions Act, 1890, s. 258, similar to R. S. O., cap. 184, s. 332.

Held—

1. That in view of the confusion arising if the by-law were quashed; also the doubt as to whether a new rate for this year could be imposed without further legislation; and the great injury to the municipality, the discretion vested in the court as to quashing same would not be exercised.

The plaintiff then asked the learned judge to hear the application on the merits. The Attorney-General —"If your lordship hears the matter at all, we would desire it to be decided on the merits." Argument thereupon proceeded with.

Ewart, Q. C., and *Brophy*, for plaintiff.

The *Attorney-General*, and *Hough*, for Crown and City of Winnipeg, the defendants.

LEGGO v. THIBAUDEAU.

Nov. 10, 1890.] [TAYLOR, C. J.

Practice in Masters office—Mortgage—Abortive sale—Priority of creditors—Laches.

Bill filed for sale under mortgage on default. By the Masters report on May 26, 1883, the priorities were settled as follows: Mary A. Herchmer, a judgment creditor first; the plaintiff in respect of the mortgage second; and L. M. and K., judgment creditors, third. These parties

had been added in the Masters' office. The day appointed for payment was Nov. 26, 1883. The suit was revived in the name of the Hon. D. H. McMillan in 1890, and on Feb. 1, 1890, a final order for sale was made. The sale proved abortive the reserve bid fixed by Master not being obtained, Plaintiff served notice of motion addressed to all defendants, applying to Referee in Chambers "for an order, (1) that the accounts directed to be taken by the decree herein etc., may be continued; (2) that the amount due the plaintiff for principal, interest and costs may be certified; (3) that a time may be appointed for the defendant to pay the sum so certified to be due to the plaintiff according to the practice of this court; and that in default the defendants do stand absolutely debarred and foreclosed, etc., or for such further order as shall seem just."

Application dismissed; plaintiff appealed.

Judgment—

The defendant, Herchmer, should never have been made a party defendant, as her claim is prior to that of the plaintiff, and the Master should have made only subsequent incumbrancers parties. But can the plaintiff be heard to urge this now? He should have moved against the Master's order making her a party. Or, if the question of priority was one in doubt, until the proof of the claim was put in, he should at once, on the claim being established to be a prior one, have offered to pay any costs incurred by her and have asked the master to discharge his own order, *Kline* v. *Kline*, 3 Ch. Cham. 161, and if he refused to do so, have appealed. He certainly cannot now have an order foreclosing her, for her claim is a prior one, the utmost he could have would be an order dismissing her in some way from the proceedings. But such an order would be in effect a foreclosure of her. Relying on her claim being proved in this suit, she did not proceed to enforce her execution and it has lapsed, so that she will no longer have

priority under an *alias* execution or proceeding of a similiar nature which she can now take. Although the Master had no jurisdiction to make her a party, and his order doing so would on appeal, have been set aside, yet the plaintiff by his conduct acquiesced in her claim being proved, and it is too late for him now, after the lapse of seven years, to take exception to its having been so. The plaintiff is, however, entitled to an order limiting a time within which the defendant by bill and L. M. and P., the subsequent incumbrancers, should pay him off or be foreclosed. The regular course would be for an order, directing payment by the plaintiff, the subsequent incumbrancers, and the defendant by bill, of the amount due the defendant Herchmer, and them providing, on such payment by them, for payment of the amount due the plaintiff by the subsequent incumbrancers and defendant by bill. This would however cause delay and expense, and the desired end will be attained by making the order for continuing the accounts limiting a time for payment by the defendants, subsequent to the plaintiff, of the amount due him, on default foreclosing them, and reserving liberty to the defendant, Herchmer to apply. If the plaintiff pay her off, there will be no need to apply ; if he does not then she can ask for a sale, or that the plaintiff pay her or stand foreclosed.

She is entitled to the costs of this application before the referee, and of this appeal, to be taxed and added to her claim.

Order accordingly.

Cameron, for plaintiff.

Perdue, for defendant Herchmer.

BROWN v. SHANTZ.

Nov. 15, 1890.] [TAYLOR, C. J.

Practice—Discharging order for security after security given.

In this case an order requiring the plaintiff to give security for costs, on the ground of his absence from the

jurisdiction, was made on March 22, 1890, and complied with by filing a bond on July 21, 1890, [Reported *ante* p. 40.]

Counsel for plaintiff now moved in chambers to discharge the order, on an affidavit of the plaintiff that he has returned to reside permanently in the province. He cited *Leggo's Practice*, 32 ; *O'Connor* v. *Sierra Nevada Co.*, 24 Beav. 435 ; *Matthews* v. *Chichester*, 30 Beav., 135.

Judgment—

In both the cases cited the application was made after the order issued and before the security had actually been given. It was so in *Harvey* v. *Smith*, 1 Chan, Cham., 392. That, as I understand, is the distinction. Where the court is satisfied that the plaintiff has become permanently resident within the jurisdiction after an order for security has been made, it may be discharged, but it will not be so if the security has been given under it. *Badnell* v. *Haley*, 7 Dowl. 19, is an authority for this. In *Place* v. *Campbell*, 6 D. and L., 113, the court discharged the order distinguishing the case from *Badnell* v. *Haley*, because "in that case security had been given for costs, but here only security has been made and no security given." The motion must be refused with costs which I fix at three dollars.

Dodge, for plaintiff.

Hough, for defendant.

NORTH-WEST TERRITORIES.

REGINA v. LAWRENCE.

SEPTEMBER 30, 1890.] [ROULEAU, J.

Appeal from conviction under N. W. T. Ordinance—Jurisdiction to hear.

This was an appeal from a conviction made by a magistrate for an infraction of a by-law of the town of Calgary, passed under the powers given to Municipal Councils by the Municipal Ordinance of the N. W. T.

The objection was taken that there was no appeal in the case of a conviction made under one of the N. W. T. Ordinances.

Held,—

That sec. 8, sub-sec. 45, of the Interpretation Ordinance of the N. W. T. although providing that: "Proceedings for the recovery and enforcement of fines, penalties and forfeitures imposed by any Ordinance for the commission of offences created thereby, may be had, taken, prosecuted and enforced, under and by means of any of the provisions contained in chapter one hundred and seventy-eight of the Revised Statutes of Canada (Summary Convictions Act), and amendments thereto," does not cover proceedings for an appeal from a conviction, and therefore, there was no jurisdiction for the Judge to hear the appeal.

Appeal dismissed with costs.

N. D. Beck, for appellant.

E. P. Davis, for town of Calgary.

CREAGH v. CAN. ANTHRACITE, ETC., CO.

OCTOBER 6, 1890.] [ROULEAU, J.

Embarrassing pleading—Striking out—Answering plaintiff's allegation in substance.

The second paragraph of the plaintiff's statement of claim was as follows:

"The plaintiff was engaged by the defendants on the 1st day of July, 1889, as manager of the farm carried on by the defendants, at Bantry aforesaid, by the year, at a salary of $70.00 per month, board and lodging extra, which agreement is contained in a series of telegrams which passed between the plaintiff and the defendants between the 18th and 26th days of June, 1889."

The second and third paragraphs of the defendants' statement of defence were as follows:

"2. The defendants say that they did not engage the plaintiff as alleged."

"3. The defendants say that a reasonable length of time prior to the said 30th day of June, 1890, they gave to the plaintiff a notice determining the said engagement on the said 30th June, 1890." The plaintiff took out a summons to strike out the paragraphs of the defence above set out, as embarrassing and not complying with the provisions of secs. 85 and 95 of the Judicature Ordinance.

Held,—

1. That the second paragraph of the defence answered the plaintiff's allegation in substance and was as specific as was necessary under the circumstances.

2. As to the third paragraph of the defence: that what was "a reasonable length of time" was a question of fact for the judge or jury, and the plaintiff could demand particulars of the time and manner of the giving of the notice and that the paragraph was not pleaded in such a way as to be embarrassing.

Summons dismissed with costs.

E. P. Davis, for plaintiff.

McCarthy, Q.C., for defendants.

THE

WESTERN LAW TIMES.

NOTES OF RECENT DECISIONS.

MANITOBA.

BARRETT v. WINNIPEG.

NOVEMBER 24, 1890.] [KILLAM, J.

Quashing by-law—Right to tax Roman Catholics for Public Schools.

Summons issued on Oct. 7, 1890, on behalf of a Roman Catholic ratepayer of the city of Winnipeg to quash by-laws 480 and 483 of the said city of Winnipeg, under provisions of Municipal Act, 53 Vic., cap. 51, sec. 258, "for illegality, and that upon the following among other grounds:

1. That because of the said by-laws the amounts to be levied for school purposes for the Protestant and Catholic schools are united and one rate levied upon Protestants and Roman Catholics alike for the whole sum."

No other ground taken.

Held—

That the by-laws were not illegal on such grounds. "I am unable to hold that the Public Schools Act, if enacted at the outset of the union, would have been *ultra vires* in establishing this new system of schools and in authorizing

the taxation complained of, without establishing or providing for the support of separate schools for any class. I think that it was quite competent for the legislature to abolish the system of separate schools which it had established, and leave parties to recur to their voluntary denominational schools if they saw fit."

Summons dismissed with costs.

Ewart, Q.C., and *Brophy* for applicant.

The Hon. Attorney-General for the Crown.

Hough for the City of Winnipeg.

[The applicant appealed, and the matter stands for the judgment of the full court.—ED.]

RE TAIT.

DECEMBER 3, 1890.] [FULL COURT.

Primogeniture may be in force in Manitoba.

This case originally came on before Mr. Justice Dubuc, who held that the law of primogeniture was apparently not in force in this province. Owing to the importance of the question, the full court consented to hear it. The question was: "Was the law of primogeniture in force in the province of Manitoba between July 15, 1870, and May 3, 1871?" The special case recited that the applicant was "entitled to an estate in fee simple under the Manitoba Act." The question as to whether estates in fee simple existed in this country under the H. B. Co's *regime* was not before the court, although the Company apparently only granted leases. For the facts see the full report, Notes of Cases, page 76.

Judgment—delivered per Killam, J.

In my opinion, in case of any land being held in Manitoba between the 15th July, 1870 and the first Intestacy Act passed in May, 1871, every such estate of such character and tenure that by the law of England it would

descend to the eldest son upon the death of the holder, such lands would so descend here. Whether any lands were so held, or what estate parties would take under the Manitoba Act, it is in my opinion not necessary to decide for the purpose of answering the question submitted. I can see no principle upon which we can hold that the law was such that there could be such estates granted and yet that there did not attach to them the incident of descent in the mode prevailing in England. It may be that for reasons of policy, or because they do not consider estates of the kind that would descend to be applicable to the conditions of the country or desirable, none such were granted by the Company. But without delaying to consider the nature of the tenure by which the Hudson Bay Company held, or whether it held lands in Assiniboia by its charter, it seems that it was always possible that some could be in some way granted which would be of the requisite tenure; at any rate, such could have been done by the Crown immediately after the surrender of the Hudson Bay Company. Even if none were granted until then, there could be no reason why the heir should not be the same as in England, notwithstanding that no such estate had ever previously been granted.

This is sufficient to enable us to answer the question in the affirmative, otherwise I should prefer to delay in order to pronounce a more carefully considered opinion before reconsidering the question of the tenure of the Hudson Bay Company upon which my brother Dubuc proceeded.

The abstract question answered in the affirmative.

Aikins, Q.C., for the Attorney-General of Canada.

C. P. Wilson, for the Attorney-General of Manitoba.

C. H. Campbell, for applicant.

Huggard, for certain of the parties interested other than the applicant.

Present—TAYLOR, C. J., KILLAM and BAIN, J J.

ROWAND v. MARTIN.

DECEMBER 19, 1890.] [FULL COURT.

Award—Biased arbitrator.

For facts, see ante notes of cases p. 139, 38 and 28.

Appeal from judgment of Bain, J., setting aside award of arbitrators.

Held—

1. It is well settled that no bill in equity will lie to set aside an award on a question of fact, within the province of the arbitrators and decided by them.

2. That the third arbitrator had "acted as a valuator of other lots, transactions which were complete before his appointment as arbitrator and which had no connection with the land in question, cannot be treated as such a disqualification as would justify the setting aside of the award."

3. That even when the evidence of value of property ranged from $125 up to as high as $1,200, and the arbitrators awarded the sum of $200, such an award could not be regarded as so grossly inadequate as to furnish evidence of corrupt and fraudulent conduct.

Decree reversed, and bill dismissed with costs.

Kennedy, Q.C., and *Culver*, Q.C., for plaintiff.

Cameron, and *Mathers*, for defendant.

Present—TAYLOR, C. J., DUBUC and KILLAM, J J.

DYSART v. DRUMMOND.

DECEMBER 19, 1890.] [FULL COURT.

Demurrer--Tender of conveyance—Pleading.

Appeal from decision of Bain, J., reported ante p. 101, allowing demurrer.

Held—

That although in *Dart's V. & P.*, 1086, it is stated that "the purchaser cannot in general sue upon the agreement

without tendering the conveyance, ... the rule, in the absence of stipulation, being that the purchaser must prepare and tender the conveyance," yet this seems rather a rule or practice of conveyancers than a rule of law and has prevailed only in comparatively recent times, and the reasons which led to the adoption of the rule in England certainly do not exist here. *Sweeney* v. *Goddard*, 4 Allen, 300 (N. B.), followed.

Per Taylor, C. J. "In this province, as my learned brothers, who have all had an extensive experience, tell me, that rule has not been recognized; at least it has not been the common course of practice to act upon it. On the contrary, the usual, if not indeed the universal practice here has been that the vendor prepares and executes the conveyance at his own expense."

Demurrer allowed. Motion dismissed with costs.

Wade, for plaintiff, demurring.

Kennedy, Q.C., for defendants, A. T. Drummond and Montreal & Western Land Co.

Bradshaw, for defendant, C. S. Drummond.

Present—TAYLOR, C. J., DUBUC and KILLAM, J J.

ONTARIO BANK v. McMICKEN.

DECEMBER 19, 1890.] [FULL COURT.

Real Property Act—Trusts—Exemption where land is mortgaged.

Appeal from decree of Dubuc, J., dismissing a bill filed to enforce a judgment recovered at law and certificate issued thereunder by plaintiffs against present defendant, Alexander McMicken, and one Sedley Blanchard, as being a charge on certain lands vested in defendant, Albert C. McMicken, and alleged to be held by him in trust for his co-defendant, Alexander McMicken. Bill alleged that defendant, Albert C. McMicken, acquired the lands upon a secret trust for his co-defendant, Alexander; that he subsequently obtained his title to be registered under the

Real Property Act, and holds a certificate of title; and that he subsequently executed a declaration of trust whereby he declared that he held the lands as trustee for Alexander only. Both defendants answered, putting the plaintiffs to the proof of all the allegations. The original co-defendant, Sedley Blanchard, died before the issue of the certificate, and no suggestion of his death was made upon the roll, and the certificate issued without reference to the death, as upon a judgment against the two jointly. Among other objections it was urged: (1) that the certificate was of no force, or that the representative of Sedley Blanchard should be a party to the bill; (2) that the trust could not be enforced on account of the provisions of the R. P. A. making the certificate of title conclusive.

Held—

1 That under the A. J. A., s. 111, and amendments, a certificate can be issued and filed under the same conditions as a writ of *fi. fa.* lands could be issued under secs. 101 and 102, which writ can be issued without any revivor or suggestion, though it can be enforced only against the goods of the survivors. *Arch. Pr.*, 1130. It was not necessary to make either the real or personal representative a party, as such certificate does not operate to charge the lands of the deceased, but only as a separate charge created by the survivor.

2. That this objection had just been dealt with in the case of *In re Massey* v. *Gibson*, (p. 164) in regard to the subject of trusts under these Acts and upon the principles there laid down it is quite within the power of the court to enforce a registered judgment against lands held in trust for another, and to compel the trustee, holder of the certificate of title, to transfer them so as to perfect the title under the Acts, of any purchaser of the interest of the *cestui que trust.*

By 49 Vic., c. 35, s. 3, "the actual residence or home of any person other than a farmer" is exempt from seizure under execution "provided the same does not exceed the value of one thousand five hundred dollars; and if the same does exceed the value of one thousand five hundred dollars then it may be offered for sale," etc. By 49 Vic., c. 35, s. 4, this applies to proceedings in equity to enforce a judgment.

Held,—

That where the property is mortgaged "it is necessary that the equity of redemption should be above the prescribed value to make it chargeable with a judgment debt; it is only the interest of the debtor that is charged; it is only a question of the value of his interest and not of the value of the entire fee simple; it is only to be sold if more than $1500 be offered for it, which cannot be expected, if the equity of redemption be not above $1500 in value."

Decree affirmed with costs.

Howell, Q.C., and *Bradshaw*, for plaintiffs.

Kennedy, Q.C., and *Mulock*, Q.C., for defendant.

Present—TAYLOR, C. J., KILLAM and BAIN, J J.

HEBB v. LAWRENCE.

DECEMBER 19, 1890.] [FULL COURT.

Seduction—Loss of service—Right of action.

Widow sued to recover damages for seduction of daughter, who was fourteen years of age and a domestic servant at time of seduction. Verdict by jury for plaintiff.

Motion, pursuant to leave reserved, to enter non-suit on ground that the girl was wholly in the service of defendant, and therefore no action would lie, as the relation of mistress and servant did not exist between plaintiff and daughter. The mother made the contract for service with the plaintiff in the presence of her daughter, who

accepted unwillingly because of the smallness of the wages. The wages were to go to the mother, and were paid to the girl, who handed them to her mother. It was not pretended that there was any express stipulation that the girl was to remain the servant of the mother and work for the defendant as such, nor was there any express agreement with the defendant, or statement to him that the wages were to be paid to the mother.

Held—

Under such circumstances the only proper inference is that the girl was to serve the defendant alone as her master in the ordinary way, and there was not sufficient evidence to warrant the jury in finding that any but the ordinary relations were to exist, or that the daughter remained the servant of the mother and was to do her work in that capacity. *Davies* v. *Williams*, 10 Q. B., 725; *Dean* v. *Peel*, 5 East., 45; *Dennett* v. *Alcott*, 2 T. R., 168; and *Carr* v. *Clarke*, 2 Chitty, 260, referred to. *Terry* v. *Hutchinson*, L. R., 3 Q. B., 599, distinguished.

Verdict set aside, non-suit entered with costs.

Hagel, Q.C., and *Dodge*, for plaintiff.

Howell, Q.C., and *Ashbaugh*, for defendant.

Present—TAYLOR, C. J., KILLAM and BAIN, JJ.

RE MASSEY v. GIBSON.

DECEMBER 19, 1890.] [FULL COURT.

Real Property Act—Unregistered transfer—Priority of execution.

A registered owner transferred land under the Real Property Act. After the execution of transfer and delivery, but before its registration, an execution against the transferor was registered. The certificate was issued to the transferee subject to the execution, but upon request, the registrar-general submitted a case for the opinion of the court, which held that the execution creditor was

entitled to priority *re Herbert* v. *Gibson*, 6 M. R., 191. Upon this the certificate issued with execution endorsed. The transferor of the transferee, who held a transfer, in fee simple without mention of the charge, then appealed from the district registrar's decision under sec. 118, R. P. Act, Man., (sec. 113, R. P. Act, Terr.,) and the same came on for hearing before the full court. For a fuller statement of the facts, see 6 M. R., 191. The full consideration for the transfer had been paid at the time of its delivery, and it was claimed that the transferee was from that time the equitable owner of the land, and the execution could not bind that estate.

Held—

1. That the learned judge by simply sending a certificate of his opinion to the registrar-general did not "decide" the question as between the parties within the meaning of the section, (120) but simply gave an opinion for the assistance and guidance of the registrar-general, who had power to disregard it, leaving the parties to raise the questions again, just as they are now doing.

2. That even if the petition cannot, under section 118, be summarily disposed of upon affidavit, in view of the fact that affidavits in reply were filed in chambers and others in rebuttal, that the objection, whatever effect might otherwise be given to it, is too late to be raised now. *Gilbert* v. *Endean*, 9 Ch. D., 259.

3. That "after a careful examination of our Real Property Acts, and a comparison of the corresponding sections of the Victoria Act, I am of opinion that these remarks from *A'Beckett's Transfer of Land*, accurately describe the position with reference to lands registered under those Acts in Manitoba."

a. That "there is no doubt that, as against the proprietor, trusts and contracts may be enforced as formerly, and although a trustee may be absolute proprietor under the

Act, a court of equity will reduce or deprive him of his interest or compel him to apply its proceeds as justice may require," p. 58. *Vide Coutlee's Manual*, p. 136.

b. That "there is this marked distinction between the statute and the general law, that the statute will not by registration recognize a trust or permit the separation of legal and beneficial ownership for the purposes of dealing. The trust may be created as between the parties to the instrument in any manner they please as under the general law, and a copy of the trust deed may be deposited with the registrar for safe custody and reference. The land may be reached through the trustee, although the trust will not be attached to the land in such a manner as to be enforced against a person acquiring it without fraud on his part," p. 56.

c. That "most of the provisions of the Act as to express trusts, will equally apply to the implied or constructive trusts raised by courts of equity upon contracts, or the creation of relations in which a ground for intervening to secure the performance of a moral obligation is recognized," p. 57. See 48 Vic., c. 28, s. s. 64, 70, 89, 97, 98, 99, 101, 107, 133, 143, M., 1885 ; 49 Vic. c. 28, s. 14, M., 1886 ; 50 Vic., c. 11, s. 37, (sub-secs. 6, 7, 8) M., 1887 ; 52 Vic., c. 16, s. s. 64, 66, 74, 81, 85, 86, 113, 114, 115, 117, 129, 130, (sub-secs. 3, 5) 145, M., 1889 ; 53 Vic., c. 5, sub-secs. 28, 30, 115, 117, M., 1890 ; 29 Vic., c. 31, s. s. 37, 38, 42, 47, 48, 49, 50, 52, 59, 107, 111, 112, 116, 151, Victoria, 1866.

4. That the registrar-general could not inquire into the existence of a beneficial interest apart from the registered title in order to ascertain whether the writ of execution bound the lands. The remedy, if any, of the original transferee was to be found only in a court of equity.

"Instead of securing that, he took a certificate of title shewing his estate to be one which was subject to a charge,

and the district registrar must take this as conclusive in registering a transfer from its holder, unless the charge was subsequently by some means extinguished."

Appeal dismissed with costs.

C. P. Wilson, and *Dodge*, for appellant.

Culver, Q.C., for Massey.

Present—TAYLOR, C. J. ; DUBUC, KILLAM and BAIN, J J.

CHEVRIER v. PARMENTER.

DECEMBER 19, 1890.] [FULL COURT.

Appeal from judge's findings of fact—Reversal or new trial—When ordered.

The plaintiff sued the defendants, as the executors of an estate, for money due on three promissory notes made and endorsed by him, which were alleged to be made for the testator's accommodation and discounted by him. The verdict was given by the Chief Justice, solely on questions of fact, in favor of the defendants. An appeal was entered against the verdict or finding of the judge on the questions of fact, and the only point of importance worthy of reporting is the position of the full court on an appeal from a judge's finding on questions of fact.

Held—

1. That the finding of a judge is at all events, to say the least of it, entitled to as much weight as the finding of a jury on facts. *Scott* v. *Dent*, 38 U. C. R., 30.

2. That an appeal in such a case should be dealt with by the court, precisely as if the verdict appealed from were that of a jury, with this one difference that if the court thinks the verdict should be set aside or reduced, it has power under Q. B. Act, s. 19, s. s. 2, to enter the verdict that it thinks should have been entered, without sending the case to be tried over again.

3. That verdict should not be disturbed, unless it appeared to be not only unsatisfactory, but unreasonable and

unjust. *Commissioner of Railways, N. S. W.* v. *Brown*, 13 App., Ca. 133.

Killam, J., concurred on the principles above expressed, as to setting aside a judge's verdict as against the weight of evidence, but pointed out that there was one element of difference between the verdict of a judge and that of a jury. In the former case the court can usually ascertain the principle upon which the judge acted, more accurately than in the case of a jury, and further discussion may show that principle to be so incorrect that the court should review the finding, as far as it is able upon written notes of evidence and proceedings. The learned judge also left the question open as to whether, on account of the expense of a new trial and for other reasons, the judge's verdict might be set aside, and at once a different verdict entered under the statutory power, and finally dissented as to one of the findings of fact of the court below as to the evidence of one of the notes sued on, being given as an accommodation note. He also commented upon the fact that the plea of *plene administravit* was untrue in this particular instance.

Appeal dismissed with costs.

Munson, for plaintiff.

Perdue, and *C. H. Campbell*, for defendants.

Present—DUBUC, KILLAM and BAIN, J J.

PRACTICE.

THE SCHOOL TRUSTEES OF EAST SELKIRK v. BANNATYNE.

NOVEMBER 21, 1890.] [THE REFEREE.

Writ returnable in vacation—Filing declaration.

The plaintiffs commenced their action by writ of summons, dated September 5, 1889, served on September 12, 1889. The defendant appeared on September 14, 1889. On September 1, 1890, an order was made in vacation extending the time for the plaintiffs to file their declaration until October 15, 1890. The plaintiffs filed their declaration on the 15th October, 1890. The defendant moved to set same aside upon the ground that the said declaration was not filed within a year after the writ of summons was returnable. The defendant contended the writ was out of court; that there was no power to grant the extension; that the plaintiffs not being able to file their declaration after August 1, and not having declared prior thereto, could not get an extension after said date. The plaintiffs contended that it was a mere irregularity, citing *Chaplin* v. *Showler*, 18 L. J., Exch. 84; *Martin* v. *Gray*, 9 B. and C., 544; *Mackenzie* v. *Macnaughton*, 3 P. R. 35; *Wallace* v. *Fraser*, 2 U. C. L. J., 184; *Barnes* v. *Jackson*, 1 Bing. N. C., 545. Also, that the defendant should have moved within four days after service of declaration, the summons only being taken out on the last day to plead. See also *Chitty*, p. 237; *Newman* v. *Haney*, 5 Dow., 262.

Held—

That the objections were not fatal.

Summons discharged with costs.

C. H. Campbell, for plaintiffs.

C. P. Wilson, for defendant, the applicant.

McCLARY MANUFACTURING CO. v. WINKLER.

NOVEMBER 22, 1890.] [THE REFEREE.

Practice—Married Woman's Property Act—Separate demurrer by married woman.

Bill filed by a judgment creditor to set aside a contract made between the defendant, S. G. W., and Man. S. W. Col. Ry. Co., for the purchase of certain lands of which the purchase money had been paid but no transfer made, alleging that such contract had been entered into by the judgment debtor, C. J. W., for his own benefit, but in the name of the defendant, S. G. W., his wife, in fraud of his creditors, and praying that the contract be set aside for equitable execution and a sale of the land, the subject matter of the contract.

Demurrers for want of equity were filed by each of the defendants. An application was then made on behalf of the plaintiffs before the referee for an order that the demurrer of the defendant, S. G. W., be withdrawn from the files of the court on the grounds: (1) that the demurrer was not signed by counsel; and (2) that no order had been made warranting the defendant, S. G. W., a married woman, in demurring separately. *Daniel*, pp. 506 and 507; *Leggo*, p. 426; The Married Woman's Property Act, cap. 65, C. S. M.; General Orders Nos. 84 and 100; *McMicken* v. *Ontario Bank*, 5 M. R., 152; *Ontario Bank* v. *Smith*, 6 M. R., 600; *Morgan & Chute*, Ch. Acts, 407; were referred to.

Held—

That the provisions of the statutes and of the general orders had not modified the rule that a married woman cannot demur separately without an order authorizing her

so to do, and that the demurrer must, therefore, be removed from the files of the court.

Order accordingly.

Cameron, for plaintiffs.
Kennedy, Q.C., for defendant.

WINNIPEG WATER WORKS v. CITY OF WINNIPEG.

NOVEMBER 24, 1890.] [THE PROTHONOTARY.

County Court appeals struck out for irregularities—Taxation of costs.

Upon taxation the brief of the appeal was disallowed and only such material as was necessary to be used on motion to strike out allowed for brief. Counsel fee as of motion to strike out allowed, on the ground that application to strike out appeal could not be made in chambers as the appeal is to full court, the application must be made there.

Bradshaw, for plaintiffs.
Hough, for defendants.

MULVIHILL v. LACHANCE.

NOVEMBER 28, 1890.] [FULL COURT.

County Court appeal—Irregularities.

Objection was taken that the security was not completed within ten days after giving of the judgment, as apparently required under sec. 243, C. C. A. 1887. The court below gave judgment in the plaintiff's favour on May 12, 1890; a reversal was applied for to same court, and judgment given therein refusing same on July 3, 1890. Notice of appeal was given on July 12, and security not perfected till September 10 following.

Held—

1. Fatal, and "nothing in the Act requires the appellant to give notice to the opposite party that the appeal has been set down."

The following dictum of Willes, J., was approved of: "The very object of instituting courts of justice is that litigation should be decided, and decided finally. . . . Human life is not long enough to allow matters once disposed of being brought under discussion again; and for this reason it has always been considered a fundamental rule that when a matter has been once *res judicata* there shall be an end of question about it. And this is especially necessary in the case of county courts, which are principally intended to deal with small amounts. Of all others it is manifest that they should have that most important of all attributes of a court of justice, viz: that their decision should be final." *Great Northern Ry.* v. *Mossop*, 17 C. B., 129.

Killam, J., dissenting:

The objection is not tenable, and the appeal should be heard.

Appeal struck out with costs.

Culver, Q.C., for application to quash.

Elliott, for defendant (appellant).

Present—DUBUC, KILLAM and BAIN, JJ.

DICKSON v. MUTUAL RESERVE LIFE ASSOC'N.

NOVEMBER 29, 1890.] [TAYLOR, C. J.

Security for costs—Payment out in lapsed suit.

The plaintiff did not declare within a year after the writ was returnable, and applies for payment out of court of $200 paid in by himself as security for costs. It was objected that the plaintiff was out of court and could not

apply for the money, and the defendant was prepared to consent to its payment out only on terms.

Held—

1. That although the plaintiff was out of court by the C. L. P. A., 1852, s. 58, his declaration, if afterwards served, would only be irregular, not void, and if pleaded to, without moving to set it aside, the irregularity would be waived.

2. That the defendant has not any order or judgment for costs, and he cannot now have a judgment so as to tax costs. *Cooper* v. *Nias*, 3 B. and Ad., 271.

3. That the plaintiff is out of court to the extent, at least, that he could not take any further proceedings in the action unless the defendant either actively or tacitly consents to his doing so, and hence, although he could not sue if a bond had been given, nor make a motion to have the money or any part paid out to him, yet the plaintiff cannot have the money paid out absolutely when the defendant assents and simply imposes a condition upon that assent.

Order made for payment out upon terms.

Cumberland, for plaintiff.

Campbell, Q.C., for defendant.

FISHER v. BROCK.

DECEMBER 10, 1890.] [BAIN, J.

Amendment of interpleader issue.

An order was made directing an interpleader issue as to whether certain goods were at the time of the delivery of the writs of execution to the sheriff, the property of Edward Fisher, *Robert Mar Fisher*, Joseph Whitely Shaw, William Dale Shaw and Richard L. Gaunt, trading as M. Fisher, Sons & Co., as against other execution creditors.

At the trial the plaintiffs sought to establish their claim by two chattel mortgages given by the execution debtor, one to Edward Fisher, *Robert Mar Shaw*, Joseph Whitely Shaw, William Dale Shaw and Richard L. Gaunt, the other to Edward Fisher, *Robert Mar Shaw*, Joseph W. Shaw, William Dale Shaw, and Richard L. Gaunt, jr., trading as "*Mark Fisher, Sons & Co.*" Upon objection being taken it was shewn that the names of the claimants were as they were set out in the first of the above mentioned mortgages, that there was a clerical error, and that the name Robert Mar Fisher was in the issue instead of Robert Mar Shaw. There was no evidence to shew that the name was correctly given in the order directing the issue. An amendment was asked at the trial allowing the substitution of the name "Robert Mar Shaw" for "Robert Mar Fisher."

Held—

1. That an amendment could not be allowed. *Douglass* v. *Burnham*, 5 M. R. 261; *Grant* v. *Hunter*, 6 M. R. 610; *Green* v. *Lord Penzance*, 6 App. Ca. 671, C. L. P. A. 1854, sec. 222; were cited.

2. That upon the trial of an interpleader issue it is the duty of the judge at *nisi prius* simply to try the question that has been referred, allowing, however, such amendments in the form of the issue as may be necessary to decide the question substantially in dispute, but not to change the issue so as to make the trial that of a different question from the one referred. *Shingle* v. *Holt*, 30 L. J. 322. And that if either party desire to have the issue amended they should apply to the tribunal which directed it, *Cababé on Interpleader*, 67; *Bird* v. *Crabb*, 30 L. J. Ex. 318; *Bird* v. *Mathews*, 46 L. T. N. S. 512; *Hamelyn* v. *Betteley* 6, Q. B. D. 63.

The sheriff being a party to the interpleader proceeding an amendment substantially changing the issue could not be made in his absence.

Amendment not allowed.

Culver, Q.C., for plaintiff.
Ewart, Q.C., for defendants.

McCLARY MANUFACTURING CO. v. WINKLER.

DECEMBER 16, 1890.] [BAIN, J.

Demurrer—Not signed by counsel.

Appeal from order of referee dismissing application to have demurrer filed by one defendant removed from files on ground that demurrer was not signed by counsel.

Judgment—

By Order 8, Rule 1, of the Con. Ord. of the Court of Chancery in England, it was provided that the clerk of the records and writs should not file any bill, demurrer, plea, answer, or disclaimer unless the same were signed by counsel; and the practice laid down in this rule became the practice of the court under the provision of the Q. B. Act that introduced the English practice and procedure. By our own Equity Orders 54 and 100, the signature of counsel to bills and answers is made unnecessary; but, probably by an oversight, it has not been provided that it shall be unnecessary to a demurrer. The signature of counsel to a demurrer in this court will be the merest matter of form, and I see no reason why the rule requiring it should be retained; but technically it seems that it is the rule, and I think that the application should have been allowed.

The order of the referee will be reversed, but I accord no costs.

Cameron, for plaintiff.
O'Reilly, for defendant.

LONDON AND CANADIAN L. & A. CO. v. MUNIC. OF MORRIS.

DECEMBER 19, 1890.] [FULL COURT.

Final judgment—Fraud on the Legislature—Endorsement—Affidavit—Sufficiency of.

Appeal from order of Killam J. made under Q. B. Act, sec. 34, allowing plaintiffs to sign final judgment for $15,770.04 with interest at six per cent. on $13,875 from July 9, 1890.

Writ issued on twelve debentures and interest coupons under a by-law passed Sept. 7, 1882, by the then Munic. of Morris. The endorsement on the writ set out "so many debentures bearing certain numbers and of a certain date, issued under a certain by-law, so much being claimed in respect of them. Where interest is claimed upon the debentures, in each case the number of them being given . . . . . ",

Held—

That the endorsement was sufficiently specific to inform the defendants of what was claimed from them; following *Walker* v. *Hicks*, 3 Q. B. D. 8.

Interest was claimed on the amount payable under the coupons, so as really to charge interest upon interest or compound interest.

Held—

That interest is payable and may be charged, as it is sought to be charged; following *Price* v. *Great Wes. Ry.* 16 M. & W., 244; *Gelpcke* v. *Dubuque*, 1 Wall, 175; *Geneva* v. *Woodruff*, 92 U. S., 502.

Held—

That the affidavit on which the summons was obtained was sufficient, it being made by a person who showed in

the affidavit that he was in a position to make the same. It is not necessary that he should depose to the fact that he is "a person who can swear positively to the debt or cause of action."

The Act 46 and 47 Vic., c. 70, which purported to legalize and confirm the by-law and debentures, was averred to be passed by a fraud upon the legislature.

Held—

That even if facts were stated to support the charge that 'the Act was smuggled through the legislature' it was an enquiry upon which the court could not enter; following *The Edinburgh Railway Coy.* v. *Wauchope*, 8 Cl. & F. 710.

"By the statute where service has been proved and an affidavit is produced stating that in the belief of the plaintiff or of some person who can swear postively to the debt or cause of action there is no defence to the action the judge may make an order for judgment, unless the defendant satisfies him that he has a good defence on the merits or discloses such facts as may be deemed sufficient to entitle them to defend the action. My brother Killam, in the exercise of the discretion given him by the statute, was not satisfied that the defendants had a good defence on the merits and did not consider that such facts as were sufficient to enable them to defend were disclosed. A great many charges are made and arguments used throughout the affidavit, but facts are not stated as required by the statute. I think the learned judge came to a correct conclusion upon the material before him."

Appeal dismissed with costs.

Perdue, for plaintiff.

Ewart, Q.C., and *Crawford*, for defendants.

Present—TAYLOR, C.J., KILLAM and DUBUC, J J.

HOWARD v. BURROWS.

DECEMBER 19, 1890.] [FULL COURT.

Solicitor's bill and capacities.

Appeal from order of Taylor, C.J., allowing appeal from referee, Notes of Cases ante p. 115.

The attorney rendered a bill of costs for $1057.44, containing a number of items for conveyancing, the charges for which were stated at $57.44, but no amounts were mentioned against the other items in the bill for attendances, interviews, letters, etc., and the last item in the bill is a charge of $1000.00 as a "fee of 2½ per cent. on purchase money to cover all my services as aforesaid exclusive of the solicitor's fees before mentioned for conveyancing."

Shortly afterwards plaintiff wrote defendant withdrawing the bill and enclosing two others in the same matter, pointing out that the new bills contained the same items and same amount as the old ones. One contained the said conveyancing charges, the other all the remaining items including the charge for $1000.00. In the plaintiff's books there was only the one account and all charges in the one matter.

Held—

1. That the two bills were in fact one, just as though all the items were on one sheet of paper and under one heading, and the first bill being clearly taxable under the statute, "the transparent device of subsequently dividing the one bill into two, which together contain the same items and amounts," did not take the two last out of its operation.

Dictum of Baron Parke: "There is no dispute as to the rule that one taxable item draws into its vortex all others in the same bill," in *Smith* v. *Taylor*, 7 Bing. 259,

approved of, as also *Watt* v. *Collins*, R. and M., 248; *Glass* v. *McDonald*, 3 Pr. R., 138.

2. The fact that the bill contained a charge of a lump sum, did not prevent its being taxed, even if there were no prescribed tariff for such services, the bill being viewed in the same light in this respect as the conveyancing charges are, which it is not disputed, are taxable.

Order allowing appeal reversed, appeal from order of referee dismissed and the order restored.

Mulock, Q.C., for plaintiff.

Munson, for defendant.

Present—DUBUC, KILLAM and BAIN, J J.

McDONALD v. CHARLEBOIS.

DECEMBER 22, 1890.] [BAIN, J.

Proceedings at law and in equity—Staying proceedings—Election.

The plaintiffs sued at law and issued garnishee orders. They subsequently filed a bill in equity and obtained an injunction, which was afterwards dissolved. The bill contained a prayer for an order for payment for the same amount sued for at law. Defendant applied to stay proceedings in the action at law. It was objected that the application should have been made in the suit in equity, which was the one last instituted.

Held—

That the abuse of the process of the court, if there were any, was on the equity side of the court, as that action was commenced subsequent to the one at law, and the application should have been made to the court in which the offending action was instituted. The proceedings on the equity side of the court having been admittedly taken for the special purpose of obtaining an injunction

the court would not have felt justified in any event in staying proceedings under such circumstances, or in putting the plaintiff to his election.

Appeal dismissed with costs.

Nugent, and *Archer Martin*, for plaintiff.

Patterson, for defendant.

THE

WESTERN LAW TIMES.

NOTES OF RECENT DECISIONS.

MANITOBA.

BROWN v. WOOD.

DECEMBER 30, 1890.] [ARDAGH, Co. J.

Novation—Accepted order—Right to sue.

Defendant gave to plaintiffs an order on one, C., directing C. to pay to plaintiffs, the amount due to defendant by C.

Plaintiffs had this accepted in writing by having C. write "accepted, payable 4th Oct.," across the face of it, and signing his name thereto.

The order not being paid by C., the plaintiffs returned same to the defendant, at the same time asking him for payment of original account. The defendant subsequently returned same to plaintiff saying that it had been given in payment, and that he, the defendant, had nothing more to do with it.

Plaintiffs sued on original account and defendant pleaded novation.

Plaintiffs stated that they had accepted the order in the usual way such orders are given and taken in busi-

ness, that they should credit the defendant with any money collected on the order, and hold defendant for balance.

The evidence for the defence was that plaintiffs had asked for an order on C. for the amount of C.'s indebtedness to the defendant, all the parties believing that C. was going to receive, in a few days, moneys from a loan company sufficient to pay the order; that defendant gave C. the order, who took it to plaintiffs, and at their request, accepted it; and that plaintiff accepted the order as payment.

Counsel for plaintiffs.—There must be a clear understanding between all the parties that a substitution of one debtor for the other was intended, that the debt from C. to the defendants was forever cancelled, and that the plaintiff accepted C. as their debtor, and released the defendants, and without this, no novation will take place.

It is clear that here the plaintiffs were not consenting parties, and in any case the effect of the plaintiffs having the order accepted should not bind them; these orders are given and taken every day, in just the way the plaintiffs say this was taken, and that is the common sense view to take of this particular transaction.

Counsel for defendant.—The fact of the plaintiffs having the order accepted, as they did, completed the novation, and the act of plaintiffs in doing so, signified their consent.

Held—

There was a complete novation, the plaintiffs having had the order accepted, were consenting parties, and they, by so doing, placed the defendant in such a position that he could not have forced C. to pay him as long as the accepted order was outstanding, and plaintiffs could only acquire the right to sue defendant by retracing all the steps taken, with the consent of all parties.

Verdict for defendant.

R. J. Wilson, for plaintiffs.

A. Monkman, for defendant.

GRANT v. HUNTER.

JANUARY 8, 1891.] [KILLAM, J.

Real Property Act—Issue—Patent—Evidence of identity of grantor.

Issue under the R. P. Act as to whether the plaintiff in the issue acquired by conveyance from the patentee of certain lands, an estate in fee simple therein, as against the defendants in the issue.

At the trial, the defendants' counsel, upon the request of plaintiff's counsel, produced the patent by which, after the recital that "Bernard Vivier, son of Michael Vivier, in his lifetime, of the Parish of St. Francois Xavier, and Baie St. Paul, in the Province of Manitoba," had applied for a grant of the lands, and had been found entitled thereto, and that Bernard Vivier had since died intestate, leaving him surviving, "Michael Vivier, of the said Parish of St. Francois Xavier and Baie St. Paul, his father and sole heir at law." The lands were granted to Michael Vivier in fee simple.

The plaintiff then produced an instrument, purporting to be a deed of conveyance of the lands in fee by "Michael Vivier, of Edmonton, in the North-West Territories, of Canada, farmer, father and sole heir at law, of Bernard Vivier, of the Parish of St. Francois Xavier, in the Province of Manitoba, deceased," to the plaintiff. The signature is that of a marksman, and is written "Michel Vivier." In the attestation clause, it is stated to have been read over and explained. There are two witnesses and also an affidavit of execution made by one witness, described as a resident of Manitoba, before a party describ-

ed as a notary public for the North-West Territories, whose signature is similar to that of the second witness.

The first witness stated that he was in the North-West with the husband of the plaintiff, (a married woman resident in Manitoba) and that, at his request, he went to Michael Vivier, a few miles from Edmonton, and told him that Grant wanted him to sign a deed that Grant had brought from his wife. Vivier told witness he knew nothing of the matter, or that he owned the land, and that he had not sold it. Witness then saw Vivier for first time, when he said he was Michael Vivier. Witness did not know Vivier had formerly gone from St. Francois Xavier. They went to Edmonton, where a man in an office read the deed in English, and Grant explained it in French, and Vivier signed it with his mark, after which Grant gave Vivier a horse and saddle.

Another witness, Pascal Bréland, stated that he lived at St. Francois Xavier, and had known one Bernard Vivier, but did not know if he were then alive or dead, nor did he know the father of this Bernard Vivier, and did not think that he was the one in question; that he knew very well, one "Michel Vivier," who had formerly lived in St. Francois Xavier, but then lived at Edmonton, to which place he (Bréland) had sent him in 1866.

Defendant adduced no evidence, but rested upon the objection, that there was not sufficient evidence of the identity of the plaintiff's grantor with the patentee.

In *Coventry on Conveyancers' Evidence*, p. 320, it is said "By common experience it is found to be a necessary presumption that a person of the same name and conveying the same interest as that limited to a person previously mentioned, is the same person . . . . ." P. 300: "The value of statements and recitals respecting pedigrees in old deeds, depends entirely on the circumstance, whether possession has accompanied the deed containing the recital.

If the deed itself be not succeeded by the tacit acquiescence of parties, privies and strangers, the recitals in it cannot be entitled to much weight."

Held—

1. "This rule as to presumption of identity from identity of names is adopted in the courts where there is nothing to rebut or weaken it." *Sewell* v. *Evans* and *Roden* v. *Ryde*, 4 Q. B., 626 ; *Hamber* v. *Roberts*, 7. C. B., 861 ; *Rogers* v. *Shortis*, 10 Gr., 243 ; *Nicholson* v. *Burkholder*, 21 U. C. R., 111 ; *Hill* v. *Long*, 25 U. C. C. P., 265 ; *Brown* v. *Livingstone*, 29 T. C. R., 520; *Rex* v. *Drake*, 1, Sew. C. C., 25 ; *Parkins* v. *Hawkshaw*, 2 Stark, 239 ; *Whitelock* v. *Musgrave*, 3 Tyr., 541, cited and considered.

2. "While some of these decisions might not now be supported, they serve to show how utterly weak is the plaintiffs' case in this instance." . . . I quite admit that the importance of the fact, of the plaintiff not possessing the patent, ought not to be considered so great where, as here, the transaction was managed on behalf of the plaintiff through a non-professional agent, and, apparently, upon a hurried, temporary visit to Edmonton." . . . "In this view, the remark which I have cited from Mr. Coventry upon the value of the recital of a pedigree without evidence of possession going in accordance with it, appears to have an application to the description contained in the deed of the grantor, as the father and heir at law of Bernard. Probably the land in question is wild land in the possession of no one, but there is neither the possession of the land, nor that of the prior title deed to strengthen the presumption from the description, and in view of the other circumstances, I do think it would be safe to rely upon the description alone, or even leave it to a jury to do so."

Nonsuit entered.

Ewart, Q. C., and *Bradshaw*, for plaintiff.
Howell, Q. C., and *Cumberland*, for defendants.

WHITE v. MUNICIPALITY OF LOUISE.

JANUARY 8, 1891.] [TAYLOR, C. J.

Municipal Act—Diverting highway—Quashing by-law—Defective notice—Estoppel.

Application under Municipal Act, Sec. 258, to quash defendants' by-law, No. 131, stopping original road allowance between the N. E. ¼ of Sec. 8, and the S. E. ¼ of Sec. 17, Tp. 3, R. 11, W., and selling it to one William Moffatt. Applicant is owner of S. E. ¼ Sec 17, and Moffatt of N. E. ¼ Sec. 8.

The affidavits filed by defendants showed that part of the road allowance in question had never been used as a road, nor could it be so used on account of a stream which traverses it, and of nine or ten sloughs or gullies crossing it; bridges would be required with heavy fillings at great expense, and also the expenditure of a large sum of money to make the road, and probably as much more annually to maintain it as would open out a new road in an ordinary place. Plaintiff's affidavits allege that the original road allowance is passable, and could be made a good road at small expense. The expense was estimated by plaintiff at $500; by the defendants at $900; and by a surveyor at $1500. Defendants secured a new road, one chain wide, by which, it appears, that plaintiff would have to travel an additional 110 rods every time he went to and returned from the market at Pilot Mound, and travel an additional four miles every time he went to and returned from another farm which he and his brother own.

Plaintiff objected to the by-law : (1) That public notices were not posted up as required by sec. 435 of said Act.

(2) That compensation has not been made to the applicant as provided for by sec. 440. (3) That some other convenient road has not been provided as required by same section.

Held—

1. That the applicant, having means of access, other than the road closed up, though not so convenient as it would be if made fit for travel, to hold under such circumstances that another road must be provided, would be most unreasonable. The reasonable construction of sec. 440 is, that it is only where a person would be by the closing of the road excluded from all ingress and egress to or from his land, that he can demand some other convenient road or way of access. *Moore* v. *Esquesing*, 21 U. C. C. P., 277, distinguished, and *Annis* v. *Mariposa*, 25 U. C. C. P, 133, explained ; *Thurston* v. *Verulam*, 25 U. C. C. P., 593 ; *McArthur* v. *Southwold*, 3 O. A. R., 295, considered.

2. That it was not a condition precedent to the passing of the by-law to close the road that compensation should be given as provided in the by-law, following *McArthur* v. *Southwold*, 3 O. A. R., 295.

The notice referred to in first objection, merely stated that "the council intend to pass a by-law to close that portion of the original road allowance lying between the N. E. ¼ 8, 3, 11, and the S. E. ¼ 17, 3, 11." That introduced and passed, was not only one closing the road, but also selling it to Moffatt. All the plaintiff knew from the notice, was that it was intended to close the road allowance. The plaintiff attended the meeting of the council and opposed the passing of the by-law.

Held—

1. That he was not by such action estopped from taking exception to the want of notice of the by-law actually passed. *Ostram* v. *Sydney*, 15 O. R., 43, distinguished.

2. "The council have passed a by-law for the sale of the original road allowance without any notice, in face of the statute, which says distinctly no council shall pass a by-law for this purpose until and unless notice has been given in a prescribed manner, and for a prescribed time. This notice being given was a condition precedent to their right to pass the by-law. Considering the extensive powers possessed by municipal councils, the danger there is of of these being used unwisely, if not to serve the interests of private individuals, they should, I think, be held to a strict compliance with statutory requirements when proceeding to exercise these powers. I am of opinion that this by-law should be quashed with costs." *Birdsall* v. *Asphodel*, 45 U. C. R., 149, followed.

Wade, and *Whealler*, for applicant.

Isaac Campbell, Q. C., for municipality.

PRACTICE.

WARD v. BRAUN.

JANUARY 7, 1891.] [KILLAM, J.

Costs—Certificate--Reasonable ground for action or defence.

Application under Admin. Jus. Act, for certificate to prevent set off of costs, the verdict recovered at the trial being under the amount of the County Court jurisdiction of $250.00.

The facts appear from the

Judgment—

I found the plaintiff entitled to payment for ten months, at $25 per month, and at the trial, but not in his particulars of claim, he admitted the defendant's right to credit for $133.85. This made the amount payable, $116.15, for which the plaintiff has a verdict. I refused an application for the Queen's Bench costs, but adjourned the consideration of the other motion until to-day. Although the certificate desired may be given in the short form, "I certify to prevent set off of costs," what the Administration of Justice Act, 1885, 48 Vic. c. 17, s. 133, s. s. 2, as amended by the Act, 49 Vic., c. 35, s. 17, requires to be certified, and what a judge must find before he is warranted in giving the certificate in the short form, is that "the plaintiff had reasonable ground for believing that he had the right of withdrawing the case from the County Court and bringing it in the Court of Queen's Bench, or that the defendant, without just reason, defended the same." Now, for the purpose of either alternative, I take it, that the onus is upon the plaintiff to bring out

in evidence, any facts upon which the certificate may be based. *Prima facie*, the verdict is conclusive upon the plaintiff, but it is not so upon the defendant, for he is entitled to the set off unless there is a certificate, so that something more than the fact of the recovery of some sum is necessary, to shew that the defendant without just reason defended the action.

I cannot say that the plaintiff had reasonable ground for believing he had the right of withdrawing the case from the County Court, and bringing it in this court. The credits, to which the defendant was entitled, were within the plaintiff's own knowledge. The circumstances, under which I found him not to be entitled to the full time claimed, were, or should have been, within his knowledge. I thought his recollection of the circumstances defective, but I cannot consider want of recollection sufficient to constitute the reasonable ground. Placing upon his services nearly the full value claimed for the time found, and allowing the admitted credits, the case was within the jurisdiction of the County Court. The plaintiff failed then to satisfy me that he had reasonable grounds. The claim being unliquidated, it was impossible for the defendant safely to pay money into court. There is nothing to suggest that he had reason to believe that such payment would be accepted. The contrary appears probable. Thus, without determining whether it could be said that the defendant, without just reason defended, if the circumstances were such, that he was without just reason for defending further than by paying money into court, I think that I must refuse the certificate.

Ewart, Q. C., and *C. P. Wilson*, for plaintiff.
Hagel, Q. C., and *Davis*, for defendant.

THE

WESTERN LAW TIMES

NOTES OF RECENT DECISIONS.

MANITOBA.

RE STARK v. STEPHENSON.

JANUARY 19, 1891.] [KILLAM, J.

Real Property Act—Priority of assignments—Validity of registration. Issue under Real Property Act.

The original holder, McKay, through whom both the parties claim was admitted by them to be entitled to a conveyance from certain "trustees" upon payment of the balance of purchase money. He assigned his interest on November 16, 1889, to Stark *et al.* The plaintiffs (caveatees), filed the assignment with the trustees at Winnipeg, on November 20, 1889, and applied to bring the land under the Real Property Act. The defendants, (caveators) claimed that they were entitled under a quit claim deed from McKay, dated November 20, 1889, which *was duly registered* on November 21, 1889. The assignment to plaintiffs was sent to the the trustees' office as above, with the balance due, and trustees conveyed to plaintiffs, but the assignment from McKay was never registered. On November 22 the managing trustee acknowledged by letter the receipt of the deed and promised to issue the deed in

plaintiff's favor unless they were prevented. The deed was duly executed by two trustees, and for two others under a power of attorney, which was not proved. The deed, although dated November 20, 1889, was not registered until January 27, 1890. The plaintiffs, with the consent of McKay, took possession of the property on and after November 20, but probably not till after the execution of the quit claim deed to defendants. The consideration of the first transfer was only $250 with a small payment to the trustees of $21.85; that of the latter, $350. The plaintiffs' purchase money was never been paid over to the original holder, partly on account of some garnishee proceedings, and partly on account of the quit claim deed. *Held*—

1. That the plaintiffs having a legal and equitable estate, would, save for the Registry Act, prevail over the defendants.

2. That the deed to the defendant was properly registered, notwithstanding the lack of an apparent execution.

3. That a quit claim deed is such an instrument as would by registration defeat a prior unregistered grant of the interest of the same grantor. *Doe d. Brennan* v. *O'Neil*, 4 U. C. R., 8; *Bruyere* v. *Knox*, 8 U. C. C. P., 520; *Waters* v. *Shade*, 2 Gr., 480; *Graham* v. *Chalmers*, 7 Gr., 597.

4. That the evidence of notice necessary to prevail against a registered instrument should be distinct and satisfactory. The Act, sec. 43, requires actual notice of the prior instrument. *Kine* v. *Dodd*, 2 Atk., 275; *Jolland* v. *Stainbridge*, 3 Ves., 485: *Wallace* v. *The Marquis of Donegal*, 1 Dr. and Wal., 488; *Wyatt* v. *Barwell*, 19 Ves., 439; *Hollywood* v. *Waters*, 6 Gr., 329; *Foster* v. *Beall*, 15 Gr., 245; *Moore* v. *Bank B. N. A.*, 15 Gr., 319.

5. That mere negligence is insufficient to warrant the imputing of actual notice. *Moore* v. *Bank B. N. A.*, *supra*;

Agra Bank v. *Burn*, L. R. 6, Eq. 144, and if admitted at all, it must be confined to the case of wilful abstinence from inquiry, and fraudulent determination not be informed.

6. That although the defendant had apparently some intimation that there was a prior assignment, such indeed, that he asked the original holder as to whether such existed, and the latter deceived him, and also that he disbelieved the informant, yet forbore to make inquiries from the plaintiff, which could have been done, and the defendant's conduct was wholly inconsistent with moral principle, and the circumstances suspicious, yet there was not sufficient proof of actual notice of plaintiffs' assignment, nor could an inference be drawn that the defendant designedly forbore further inquiry from fear of learning of such assignment.

Issue found for defendant with such qualification to be inserted as would protect any lien of the plaintiff.

Howell, Q. C., and *Phippen* for plaintiff.

Ewart, Q. C., for defendant.

RE THE LAKE WINNIPEG TRANSPORTATION L. & T. CO.

JANUARY 26, 1891.] [TAYLOR, C. J.

Winding up Act—Insolvency—Ultra vires—Time: exclusive or inclusive.

Petition under The Winding up Act, by a creditor (who happened to be President) having an unsatisfied execution in the sheriff's hands. Several creditors appeared and supported the petition. No cause was shown by the Co., but several prior execution creditors opposed.

The company's charter was granted under C. S. M., c. 9, s. 226, and the petition set out that "it was doing the business of lake and river transportation of passengers and goods within the Province of Manitoba, by steamer or other

vessels, the employment of tugs and barges for all purposes of their ordinary use, and the buying and selling of ships, vessels and materials, the cutting of logs, wood and timber, and manufacture and dressing of timber, lath, shingles and other forest products, the sale and transportation of same, the working of timber limits in connection therewith, the catching, curing, transportation and dealing in fish and fish products and supplies for fishing business, dealing and trading in general merchandise."

Held—

1. That creditors as well as the company may oppose such an application, if they have notice. The Winding up Act, secs. 8 and 10; *Emden*, p. 89; *Lindley on Companies*, p. 636; *Uruguay Central Rail Co.*, 11 Ch. D., 372; *Great Western Coal Consumers Co.*, 21 Ch. D., 769; *Chapel House Colliery Co.*, 24 Ch. D., 259.

2. That the petitioner is an execution creditor is no bar to his filing a petition, for a subsequent creditor may derive great benefit from an order which will put all prior to him, as well as subsequent, on an equal footing. *Chapel House Colliery, supra.*

3. That an order can be made in this Province for winding up notwithstanding 52 Vic., c. 32, sec. 3; and R. S. C., c. 129, is still in force.

4. That the charter was *intra vires* of the Provincial Legislature and did not come within the legislative powers of parliament under the title of "Inland Fisheries."

5. That if the charter were *ultra vires* the company was an illegal one and no order for winding up could be made. *Ex parte Hargrave*, L. R., 10 Ch. 542; *Re S. W. Atlantic S. S. Co.*, 2 Ch. D., 763; *Re Padston Total Loss, etc.*, 20 Ch. D. 137.

6. That "Inland Fisheries" referred apparently to the law of the road, lights to be carried, how vessels are to be registered, evidence of ownership and title and transference

of interest. *The Queen* v. *Robertson*, 6 S. C. R. 52; *Venning* v. *Steadman*, 9 S. C. R., 206, followed.

7. That the Co. was within the term trading company, R. S. C., c. 129, s. 2, sub-sec. *c*.

8. That the company could not be held to be insolvent within the meaning of sec. 5, sub-sec. *d*, upon the fact of the non-appearance of the company and upon the statement of the applicant "that the company is insolvent and unable to pay its debts in full."

9. That in view of the fact that there was an execution in the sheriff's hands on Dec. 30, and a seizure under one of these and other writs, that some barges of timber, etc., were seized, that the same were advertised for sale on Jan. 3, following, and notice of sale posted up was dated Dec. 24; it was held that it was a writ remaining unsatisfied till within four days of the time fixed for the sale within the meaning of sub-sec. *l*, sec. 5; and that the "four days" were inclusive not exclusive. *Lester* v. *Garland*, 15 Ves.. 248; *Ex parte Fallon*, 5 T. R., 283; *Williams* v. *Burgess*, 12 A. and E, 635.

Winding up order made.

Mathers for the petitioner.

Hough and *Elliott* for consenting creditors.

Cameron and *Darby* for opposing creditors.

BARRETT v. WINNIPEG.

FEBRUARY 2, 1891.] [FULL COURT.

Quashing by-law—Right to tax Roman Catholics for Public Schools.

The judgment of Mr. Justice Killam, *ante* p. 157, was affirmed on appeal, Mr. Justice Dubuc dissenting.

Ewart, Q. C., and *Brophy* for applicant.

The Hon. Attorney-General for the Crown.

Present—TAYLOR, C. J., DUBUC and BAIN, J J.

[This case has gone to the Supreme Court.—ED.]

RE THE CANADIAN PACIFIC RAILWAY COMPANY.

FEBRUARY 11, 1891.] [FULL COURT.

Real Property Act—Mortmain—Lands in added territory—License to hold lands—Limitations on provincial authority—Dominion corporations subject to provincial laws—Ultra vires.

Case submitted by Lieut.-Governor-in-Council under 53 Vic., c. 16. The questions are given in the judgment.

After hearing counsel on behalf of Attorney-General, the court adjourned till the following morning, when judgment was delivered by Hon. Mr. Justice Killam on behalf of the court, without calling upon counsel for the Company :

Judgment—

We do not think it necessary to hear an argument in the interest of the Canadian Pacific Ry. Co. upon the questions submitted for our opinion by His Honor the Lieutenant-Governor under 53 V., c. 16, respecting the power of that company to take, hold, acquire, etc., lands in a portion of this Province, without a license from the Lieutenant-Governor-in-Council.

The case relates wholly to the lands situated in the territory added to Manitoba in 1881, which have been granted and are to be granted to the company as part of its subsidy for the construction and operation of its railway under Can., 44 V., c. 1, 1881. The lands are divided into different classes which it is unnecessary now to distinguish.

By 49 V., c. 11, s. 4, 1886, "No company, corporation, or other institution, not incorporated under the provisions of the statutes of this Province, shall be capable of taking, holding or acquiring any real estate within this Province unless under license from the Lieutenant-Governor-in-Council under any statute of this Province." Several statutes have from time to time been

passed by the Provincial Legislature authorizing the issue of licenses to corporations permitting them to take and hold lands or securities upon lands in Manitoba. These have been repealed and consoldated and to some extent amended by 53 V., c. 23, s. 15. The Canadian Pacific Railway Co. has taken out no license under any of these statutes.

Under these circumstances the questions submitted for our opinion are:

1. Has the Canadian Pacific Railway Company power to take, hold, acquire, dispose of, sell or contract to sell or grant such lands in the added territory or any of them, without taking out the license required by the statutes of this Province?

2. Is the legislation of the Manitoba Legislature comprised in chapter eleven of forty-nine Victoria, and chapter twenty-three of fifty-three Victoria, *ultra vires* in so far as it effects the Canadian Pacific Railway Company in respect of any or all of the classes of lands above set forth?

The Act incorporating the company, Can., 44 V., c. 1 was passed on the 15th February, 1881. It recites that, by the terms of admission to the Union of British Columbia, Canada had assumed the obligation of causing a railway to be constructed connecting the seaboard of British Columbia with the railway system of Canada; that Parliament had repeatedly declared a preference for the construction and operation of the railway by an incorporated company aided by grants of money and land, rather than by the Government; and that a contract appended to the Act had been entered into for the purpose. The statute then enacted that the contract was thereby approved and ratified and the government authorized to carry it out; that the Governor-General might grant to the parties named a charter in a form appended to the Act incorporating them under the name of The Canadian Pacific Railway Company and

confering on them the franchises, privileges and powers therein mentioned, and that upon its publication in the Canada Gazette, this charter should have the force of an Act of Parliament. The statute also provided that upon certain security being given, and in consideration of the completion and perpetual and efficient operation of the railway by the company, the government might grant to the company a subsidy of $25,000,000 in money and 25,000,000 acres of land to be paid, and conveyed, as provided by the contract.

The contract purported to be made between Her Majesty and certain individuals, and provided for the construction and operation of the railway by the latter and the granting of certain considerations therefor by Her Majesty, among which were the grants of money and lands to be made in certain proportions as the work proceeded.

The charter was granted on the 16th February, 1881, incorporating the individuals and such others as should become shareholders under the name mentioned, and substituting the corporation for the individuals as parties to the contract. This charter was then published in the Canada Gazette.

The 4th section provided, "All the franchise and powers necessary or useful to the company to enable them to carry out, perform, enforce, use, and avail themselves of every condition, stipulation, obligation, duty, right, remedy, privilege and advantage agreed upon, contained or described in the said contract, are hereby conferred upon the company."

The 17th section provided, "The Consolidated Railway Act, 1879," in so far as the provisions of the same are applicable to the undertaking authorized by this charter, and in so far as they are not inconsistent with or contrary to the provisions hereof, and save and except as hereinafter provided, are incorporated herewith."

By the 1st sub-section of section 7 of the last mentioned Act a railway company is given power "To receive, hold and take all voluntary, grants and donations of land or other property made to it, to aid in the construction, maintenance and accommodation of the railway."

By the Can. Act 44 V., c. 14 1881, provision was made for the extension of Manitoba by including within it certain territory formerly a portion of the North-West Territories. One term of this extension was, as provided by section 2, sub-section (b), "The said increased limit and territory thereby added to the Province of Manitoba shall be subject to all such provisions as may have been or shall hereafter be enacted respecting the Canadian Pacific Railway and the lands to be granted in aid thereof."

The assent of the Legislature of Manitoba to the extension and its terms was given by 44 V., caps. 1 and 6, assented to respectively 4th March and 25th May, 1881. The extension took effect 1st July, 1881.

Very full and able arguments have been presented to us by counsel for the Province for the propositions that the Provincial Legislature may prohibit the holding of lands in Mortmain within the Province by corporations however incorporated, or impose conditions upon their being so held, and that under the provisions of our Acts relating to the Court of Queen's Bench, 38 Vic, c. 12, s. 1, 1874; C. S. M., c. 31, s. 4; 48 Vic, c. 15, s. 7, 1885, the English laws of Mortmain were introduced into this Province, and that no corporation can hold lands in Manitoba without a Provincial license. We do not, however, find it necessary to enter into a consideration of these questions.

Before the territory in question was included in Manitoba, and when Can. 44 Vic, c. 1, was passed, that territory was not included in any Province and was subject fully to the legislative authority of the Parliament of Canada in all matters. Whatever, then, might be the

position in the Provinces, that Parliament could authorize any corporation to take and hold lands in the North-West Territories. It is difficult to conceive any more effectual mode of confessing such a power than is exhibited in the statute Can. 44 V., c. 1, the contract and the charter. And to wind up the transaction the lands are to be granted to the company by the letters patent of the Crown.

The argument for the Province is that the Provincial Legislature has a right to determine how lands in the Province shall be held, whether it is in the public interest that they shall be acquired, or held, by corporate bodies, or the conditions upon which they may be so held, although another company may create the company and fix its corporate powers. But the Dominion Parliament determined these matters for the added territory, and in respect of the lands in question, before they became a part of Manitoba, and, by the Extension Acts, that territory was to continue subject to the provisions thus enacted, both with respect to the railway and with respect to the lands.

It is suggested, if I understand the argument aright, that these enactments still affected only the corporate capacity of the company created, and that the question of the liability of the lands to be held by a corporation was left open to Provincial legislation. But it appears to us that the legislation of Parliament was complete and that nothing more was required to make those lands susceptible of being held by that corporation.

The statute, Can. 44 Vic., c. 1, shows that it was enacted upon public grounds, and that the company was to be given the lands, in return for a consideration of value to Canada. It is evident that the condition in the Extension Acts was imposed to prevent such legislation by the Province as would deprive of the company ot the price to be paid for its services. The condition, then, which the

Province now seeks to impose upon the company's enjoyment of a position of that piece is certainly inconsistent with the provisions of the Dominion Acts relating to these lands.

No distinction has been suggested upon the words "dispose of, sell, or contract to sell or grant," used in the case, and it does not appear to us that any arises.

We will, therefore, answer both questions in the affirmative.

Cameron and *Wade* for the Attorney-General of Manitoba.

Ewart, Q.C., and *Tupper*, Q.C., for The Canada North-West Land Co. and The Can. Pac. Ry.

Present—DUBUC, KILLAM and BAIN J J.

PRACTICE.

McKAY v. NANTON.

JANUARY 26, 1891.] [BAIN, J.

Issue under Real Property Act—Irregularities in caveat.

The caveatee applied for a certificate of title to certain lands ; the caveator claimed an estate in fee simple therein.

It was objected : (1) That in the caveat filed by the petitioner in the land titles office, the name of the applicant is stated to be Augustus Meredith *Newton*, whereas the name is Augustus Meredith *Nanton*. (2) That there is nothing in the petition before the court to shew that the lands have not been registered under the Act. (3) That the caveat does not comply with the provision of s. 130, s. s. 8, which directs that a caveat "shall state some address or place within the Province of Manitoba, at which

notice and proceedings relating to such caveat may be served." In the usual notice served the name *Nanton* was not very plainly written, and the person preparing the caveat was evidently under the impression that it was *Newton*, for the application number was correctly given, and the land was also properly described, and the applicant was apparently duly notified under sec. 130, s. s. 4.

Held—

1. That the direction in the statute as to the stating of the name of the applicant must be held not to be imperative, and that the mistake in the name was only an irregularity and amendable.

2. That in view of the fact that the petition alleged that the caveatee had applied to bring the lands under the Act, and that the petitioner had filed a caveat forbidding this, it would be assumed that the caveat was lodged before registration of the certificate.

3. That the form of caveat which reads: "I appoint as the place at which notices and proceedings thereto may be served" was not complied with in a notice, "that I appoint A. N. McP., Commissioner of Railways office, Winnipeg, *my agent on whom* notices, etc., (as in prescribed form) sec. 130, s. s. 8, sched. O., in that the statute requires that the caveat appoint *some place* for the service of notices, not *some person*.

4. That when the legislature chooses to provide for such matters with the apparent intention, that they should be adhered to, no supplementary or different mode which even attains the same end, is allowable or permissable, but the proceedings are void. *Nosworthy* v. *Buckland in the Moor*, L. R., 9 C. P., 233; *Howard* v. *Bodington*, 2 P. D., 203.

5. That objections of this nature should be taken under sec. 13, s. s. 12, under an application for an order for the discharge or withdrawal of the caveat.

Petition dismissed with costs.

C. P. Wilson for caveator.

Munson for caveatee.

DOUGALL v. LEGGO.

JANUARY 29, 1891.] [BAIN, J.

Prohibition—Jurisdiction—Abandonment of excess—Account "settled" or "stated."

Rule *nisi* for prohibition to county judge of Selkirk, for want of jurisdiction. Plaintiff issued writ of attachment for the following account :

1890.		
Oct, 11.	To 25 months rent of hack, from 11th September, 1888, to 11th October, 1890, at $25.00 per month.....	$ 625 00
	Repairs to hack.....	2 50
		$ 627 50
1889.	CR.	
January 7.	By cash $50.	
do.	4.....	$ 54 00
		$ 573 50

Plaintiff abandoned surplus over $250, and proved his claim for full amount before county judge, who entered verdict for $250.00. It was objected that this being an unsettled account, exceeding $400, it could not be brought within the jurisdiction by abandonment of excess.

Held—

1. That the account was an unsettled account within the meaning of sec. 45, Co. Ct. Act, '87.

2. An unsettled account, as referred to in above Act, means an account that has not been "stated," following *Re McKenzie* v. *Ryan*, 6 Pr., 323 ; and a "stated account"

is defined by *Wharton* to be one that "has been expressly or impliedly acknowledged to be correct by all parties."

Sec. 174 provides that no "plaintiff shall divide any cause of action into two or more actions for the purpose of bringing the same within the provisions of the preceding sections in relation to the issue of writs of attachments; but any plaintiff having a cause of action above the value of $250, for which an attachment might be issued if the same were not above the value of $250, may abandon the excess, and upon proving his case may recover an amount not exceeding $250 . . . . "

Held—

That though the action could not be maintained as far as the main provisions of sec. 45 applied, yet the provisions relating to attachments, contained in secs. 164, 171, and 174, are intended to deal with the whole subject of right for attachment, and the court could not undertake to modify the expressed intention of the legislature by reading into sec. 174 the restriction contained in sec. 45.

Rule discharged with costs.

Phippen for plaintiff.

Davis and *Ashbaugh* for defendant.

[Defendant appealed to Full Court; case has been argued and stands for judgment. ED.]

LAIRD v. TRERICE.

JANUARY 29, 1891.] [BAIN, J.

Writ—Service out of the jurisdiction.

The plaintiff sued the defendant, a non-resident, upon a cause of action which arose out of the jurisdiction. No order allowing the service was obtained prior to the service of the writ, but the copy of writ was served in the usual way. After the service, the plaintiff applied to the referee for an order allowing the service and for leave to proceed. The referee held that the two orders must be separate and

that the order allowing the service must be served upon the defendant before the order for leave to proceed could be obtained. The plaintiff then applied to a judge in chambers who held :

1. That the service of a writ outside the jurisdiction has practically no effect at all until an order allowing the service has been obtained, and "I am quite satisfied that the proper practice is to obtain an order allowing the service of the writ before the writ is served and serve it with the writ." The amendment to the A. J. A., 1885 in 1886, 49 Vic., cap. 35, sec. 32, practically repeals sec. 18, C. L. P. A., 1852.

Application refused.

Patterson for applicant.

BANK OF MONTREAL v. POYNER.

FEBRUARY 2, 1891.] [BAIN, J.

County Court—Writ of prohibition.

The facts appear from the

Judgment,—

This is an application for a writ of prohibition to the judge of the county court of the county of Selkirk to prohibit him from further proceeding in the action in the county court, on the ground of want of jurisdiction. It appears that the promissory note sued on was made by the defendant at his residence in the county of Brandon, and that when the action was begun he did not reside, or carry on business, within the jurisdiction of the county court of Selkirk. Unless, therefore, the case can be distinguished from *Wright* v. *Arnold*, 6 M. R. 1, I must hold that this county court had no jurisdiction.

Although the cause of action did not arise, and the defendant did not reside or carry on business, within the jurisdiction of this county court, it would have been competent for any judge to have made an order, under

Sec. 48 of the County Court Act, authorizing the suit to be brought in the court in which it was brought, and Mr. Phippen contends that, as the defendant has not expressly shewn that such an order was not made, this court will not assume that it was not, and he cites a number of cases which establish that an application for prohibition to an inferior court ought not to be granted, unless it be made clearly to appear that, under no view of the facts, has the inferior Court jurisdiction. *McKenzie* v. *Ryan*, 6 Pr., 323, and cases cited there. But, in his affidavit, the defendant makes the general statement that the said court has no jurisdiction to entertain the suit, and this shews that, as far as his knowledge extends, no special order has been made. An order might have been made *ex parte*, but, if it had been, the plaintiffs' should have met the general statement of the defendant by shewing that they had obtained the order. Here, as in *Wright* v. *Arnold*, there is no pretence that such an order was, in fact, made.

The other ground urged by Mr. Phippen is, that the defendant has submitted to the jurisdiction and cannot now ask for a prohibition. It appears that the defendant filed a dispute note in the county court, setting up a defence on the merits, but in the dispute note he expressly objected to the jurisdiction of the court. The rule is that, where the want of jurisdiction arises, not from the nature of the subject of the suit, but because the defendant is not resident within the jurisdiction, then, if the defendant appear, for the purpose of entering into the merits of the suit, and not for the purpose of objecting to the jurisdiction, he cannot afterwards apply for protection. *Mayor of London* v. *Cox*, 2 L. R., H. L., 283; *Robertson* v. *Cornwell*, 7 P. R. 297; *Archibald* v. *Bushey*, 7 P. R. 304.

But, here, when the defendant takes express objection to the jurisdiction, and follows up his objection without

delay, by applying for prohibition, he cannot be said to have aquiesced in, or submitted to, her jurisdiction.

I make the rule absolute, with costs.

Mulock, Q. C., for applicant.

Phippen for judge.

[*Vide* our note on this case in Notes and Comments, p. 234.]

REGINA v. STARKEY.

FEBRUARY 2, 1891.]]FULL COURT.

Certiorari—Jurisdiction to award costs—Recognizance.

Appeal from judgment of Killam, J., reported *ante*, pp. 137 and 88, on the following ground :—"the said judgment . . . . was wrong in dismissing the said motion with costs, and that the learned judge had no power to award costs, because the said rule *nisi* was dismissed upon the sole ground that the defendant was not shown to have entered into a recognizance for costs pursuant to 53 Vic., c. 2, s. 40, the defendant submitting that there being for the purposes of the motion, no recognizance, there cannot be an order against the defendant for costs."

Counsel for the convicting justices argued that this is not a criminal matter but merely a proceeding to enforce a a Provincial law.

Held—

1. In cases where there is no recognizance, the jurisdiction of the court to award costs seems to be more liberally exercised now than in former years. *Peters* v. *Sheehan*, 10 M and W., 213 ; *Reg.* v. *Steel*, 2 Q. B. D., 37 ; *Great Nor. R'y Co.* v. *Inett*, 2 Q. B. D., 284 ; and *Crowther* v. *Boult*. 13 Q. B. D., 680, cited.

2. The giving of costs to a private prosecutor or the justices is a different thing from awarding the same to the

Crown. *Rex* v. *Jenkinson*, 1 T. R., 82, and *Reg.* v. *Flannegan*, 9, C. L. J. N. S., 237, considered and distinguished.

3. Where a rule *nisi* to set aside a conviction is discharged, it is not necessary to formally affirm the conviction, a rule or order simply issues discharging the rule *nisi*, which is an affirmance of the conviction.

4. That the learned judge had, irrespective of any recognizance. and in the exercise of the general jurisdiction of the court, power to award costs, and having done so, the present application should be refused with costs. *Reg.* v. *Edmunds*, 31 L. T. N. S., 237, followed ; *Clark* v. *Alderbuy*, 6 Q. B. D., 139 and *Queen* v. *Baxendale*, (mentioned in note thereto, p. 144) distinguished.

Application dismissed with costs.

Mulock, Q. C., for the convicting justices.

Cassidy for the defendant.

Present—TAYLOR, C. J., DUBUC and BAIN, J J.

EDEN v. EDEN.

FEBRUARY 4, 1891.] [FULL COURT.

Practice—Form of foreclosure decree—Mistake in consent decree—Costs.

Appeal from decree pronounced by Taylor, C. J.—for which and for facts see *ante* p. 116 on behalf of defendants Roe and Jackson (bill noted *pro confesso* against Eden) to have the decree "re-heard, reversed or varied on the ground that the plantiff upon his bill is only entitled to foreclosure of the mortgage as against the defendant, Eden, and also for a new or further hearing of the cause on the ground of error, mistake or surprise in as much as the defendants, Roe and Jackson did not submit to a decree of foreclosure as stated in the judgment of the Chief Justice." A conflict arose between counsel as to what decree the counsel for defendants, Roe and Jackson, had submitted to. Counsel for plantiff contended that defendants' counsel con-

sented to an ordinary decree of foreclosure, against the two defendants for whom he appeared.

The form of such a decree in the Equity, orders is given as follows:

"It is ordered and decreed that the said defendants do stand absolutely debarred and foreclosed of and from all equity of redemption in and to the said premises."

Instead of this decree, one which might "prejudice the title of the defendants far beyond what a decree in the ordinary form would have done," was taken out as follows:

"That in default of the said defendants making payment by the time aforesaid, the said defendants and each of them do it and absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption in and to the said premises."

The judgment of the court was delivered by Bain, J. and Killam J. That of the latter learned judge is as follows:—

Judgment—

It appears to me that the decree does not properly embody the consent given on behalf of the defendants. The answer appears to admit the making of the mortgage by the defendant Eden, but it disputes the title of the defendant, Eden, and the plantiff, and sets up a title paramount to the mortgage. The defendants did not consent to the decree in its terms, but in general words to a decree of foreclosure. I am not satisfied, as my brother Bain, appears to be, that the defendants' counsel intend that the decree should explicitly be a decree of foreclosure against all the defendants. I think it not improbable that his attention may not have been drawn to any specific mention of this. However, there being no evidence, and no decree against the answering defendants being possible except upon their consent, we must look to the pleadings and to the circumstances for the purpose of determining the mean-

ing of the consent. And if there is any ambiguity or anything left doubtful, the benefit of that doubt must be given to the defendants, for the court cannot undertake to grant more than the defendants conceded.

And the defendants in their answers contested the plaintiff's title. They were up to the very point of the consent, contesting the plaintiff's right to relief against them upon the ground that the bill did not show the title of the mortgagor or mortgagee as against them. They cannot be understood as intending to abandon this position, but they were willing that the plaintiff should have a decree foreclosing all equity or right to redeem the mortgage. Whether, then it was to be expressed to be one barring them as well as the mortgagor in this respect was probably not considered as important. But what they have a right to insist upon, and all that they now ask is, that it shall go no farther. The decree does distinctly go farther, and I agree with the view of my brother, Bain, that it should now be so limited as clearly not to bind more that the right if any, to redeem the mortgage. As, however, I think that the parties were really not *ad idem*, I agree that the plaintiff should not be bound to take this decree and that he should be at liberty to take the cause down again for the examination of witnesses and for a new hearing.

Under all the circumstances I think that no costs should be allowed, particularly as the plaintiff has sought to obtain a decree and afterwards to insist upon at least a construction going beyond what his counsel could properly have understood the defendants' counsel to assent to.

Howell, Q.C., and *Cumberland* for plaintiff.

Ewart, Q.C., and *Elliott* for defendants, Roe and Jackson.

PRESENT—DUBUC, KILLAM AND BAIN, J.J.

ASHDOWN v. LYNCH.

FEBRUARY 10, 1891.] [ARDAGH, Co. J.

Examination of judgment debtor in county court.

A judgment was recovered in the county court, prior to the enactment of The County Courts Act, 1887, for a sum under $50.00. A summons was granted, calling upon the defendant to shew cause why he should not be examined as a judgment debtor. It was objected, upon the return, that the court had no power to make such an order in this case, as sec. 253 of Co. Court Act, 1887, did not apply, and that sec. 47, and sec. 52, A. J. A., read in connection with sec. 2, sub-sec. 1, limited the jurisdiction to cases over $100; and that, in any event, sec. 47 was not sufficiently broad to introduce the provisions of the A. J. A. in the face of sec. 253.

Held,—

That such an order could be made under sec. 47. Order made.

Monkman for plaintiff.

Baker for defendant.

FREEHOLD L. & S. CO. v. BRYSON, AND GALT, *et al*, CLAIMANTS.

FEBRUARY 10, 1890.] [BAIN, J.

Interpleader—Defects in sheriff's affidavit—Waiver of—Plaintiff in issue—Possession.

Appeal to judge in chambers from interpleader order of the referee directing an issue in which claimants were made plaintiffs. The claimants appealed from the order, on the ground that the summons and order were improperly granted, and that there was no basis or foundation for the order, because :

(1) The affidavit of the sheriff on which the interpleader summons was granted did not state, (*a*) that the goods

seized were the property of the defendants, or, (*b*) that the sheriff believed them to be so, (*c*) or any facts which would warrant the seizure of them as defendant's goods.

(2) That the affidavit did not state that the sheriff was in possession of the goods at the time of making the application, or that the proceeds of any sale thereof were then in his hands.

(3) That the evidence before the referee showed that the claimants were in possession of the goods at the time of the seizure, and claimants should therefore have been made defendants in the issue, and not plaintiffs.

It was urged in reply, that the claimants by not raising the first two questions before the referee, had waived the right to take advantage of the same on appeal, as they were mere irregularities, and that as to the question as to who should be plaintiff in the issue, the referee had exercised his discretion, which would not be reviewed on appeal.

Counsel for claimants in reply : the defects complained of in the sheriff's affidavit are not mere irregularities or formal defects, but matters of substance going to the whole foundation of the sheriff's right to an interpleader under the statute and could not be waived, citing in this connection, *Ex parte Coates*, 5 Ch. D., 779, followed by *Ex parte Johnston*, 25 Ch. D., 114-116. As to what must be shown by the sheriff in his affidavit to entitle him to relief: *Archbold*, 1406 ; *Lush*, 777 ; *Parkinson's C. P.*, 151 ; *Cababe*, 31 ; *Chitty's Forms*, 822 ; *Northcote* v. *Beauchamp*, M. & S., 158 ; *Cook* v. *Allen*, 2 Dow., 11 ; *Anderson* v. *Calloway*, 1 Cr. & M., 183 ; *Scott* v. *Lewis*, 2 Cr. M. R., 289 ; *Holton* v. *Guntrip*, 6 Dow., 131 ; *Crump* v. *Day*, 4 C. B., 760 ; *Day* v. *Carr*, 7 Ex., 882 ; *Wheeler* v. *Murphy*, 1 Prac., 366 ; *Ogden* v. *Craig*, 10 Prac., 378 ; *Merchant's Bank* v. *Herson*, 10 Prac., 117 ; *Duncan* v. *Tees*, 11 Prac., 66 and 296, and others. As to plaintiffs in

issue: *Merchants Bank* v. *Herson* and *Duncan* v. *Tees*, *supra*; *Dom. Sav. & I. Co.* v. *Kilroy*, 7 C. L. T., 87, and *Morris* v. *Martin*, 19 Ont., 564.

The fact of an issue having been decided by the referee constituted no waiver on of the part of the claimants. It was an operation of law under the statute, consequent upon the sheriff's application. The claimants would not "abandon their claim," and as they decided to maintain their rights, the referee could only, in such case, direct an issue, which was a position forced on the claimants by the statute without any alternative.

Held—

1. That the sheriff's affidavit was clearly insufficient, but the objections thereto not having been taken before the referee, and the learned judge being of the opinion that the objections did not go to the jurisdiction, but were merely questions of practice, they could not prevail on this appeal.

2. The practice in this court is settled, that when goods have been seized in the possession of a claimant, he should be the defendent in an issue between him and the execution creditor; and as the only evidence on the point shews that *prima facie*, the claimants were in possession when the goods were seized, the order of the referee should be varied by making the claimants the defendants in the issue.

Order accordingly.

The issue was settled according to that directed in *Duncan* v. *Tees*, 11 Prac., 296.

Nugent and *Archer Martin* for claimants.

Campbell, Q. C., and *Mathers* for execution creditors.

Cumberland for sheriff.

[The claimants have appealed from so much of this order as discharges the summons in appeal to set aside the interpleader summons and order. ED.]

SPRAGUE v. GRAHAM.

FEBRUARY 12, 1891.] [BAIN, J.

Real Property Act—Petition—Defects in.

Petition filed to enforce a caveat under Real Property Act. The facts appear from the

Judgment—

It appears that the petition in this matter was filed after the expiration of one month from the receipt of the caveat by the District Registrar, and the objection is taken that the petition is defective in that it does not allege that the certificate of title was not issued.

Sec. 130, s.s. 2 of the R. P. Act, 1889, provides that, after the expiration of one month from the receipt thereof, such caveat shall be deemed to have lapsed, unless the person by whom or in whose behalf the same was lodged shall, within the time, have taken proceedings under the rules in schedule R, to establish his title, etc. But sec. 43 of the Act of 1890 provides that 'notwithstanding anything in the said chapter 16 and amendments contained, a petition under a caveat may be lodged at any time before the issue of the certificate of title.'

In *Re McKay* v. *Nanton*, p. 201, when the petition was filed before the expiration of a month after the caveat had been lodged, I held that the petition was not defective for not alleging that no certificate of title had been registered, as I would assume that the directions of the statute would be obeyed, and that, a caveat having been lodged, the District Registrar would not bring the land under the new system as long as the caveat was in force. But the case seems to me to be different, when, as here, the petition has not been filed before the expiration of one month.

The effect of sec. 43 of the Act of 1890, cannot be, as was contended, to repeal sub-sec. 2 of s. 130. The provision in the sub-sec. stands, and it is competent for the Dis-

trict Registrar, after the month has elapsed and no petition has been filed, to proceed with the investigation of the title and to issue the certificate of title to the applicant. But then by sec. 43, if after the expiration of the month, but before the certificate has issued, the caveator still files a petition, the caveat revives, as it were, and matters are put in the same position that they would have been in had the petition been filed before the expiration of the month. But a caveator can get the benefit of sec. 43 only in cases where the certificate of title has not issued, and, as there cannot be the assumption, where the petition has not been filed till after the month has expired, that there is when it is filed within the month, that the certificate has not issued. I am of opinion that the proceedings are defective in not shewing that the certificate had not issued. It is the fact that it has not issued that enables the caveator to proceed with his petition, and it is incumbent on him to shew to the Court that he is so entitled.

The defect, however, seems to be one that I have power under rule 15 of schedule R, (s. 38 of Act of 1890) to allow to be amended, and I allow the caveator to amend as he may be advised.

Petition dismissed with costs fixed at $5.00. Amendment allowed.

Culver, Q.C., for defendant.

Hough for plaintiff.

LONDON & CAN. L. & A. CO. v. MUNICIPALITY OF MORRIS.

FEBRUARY 14, 1891.] [TAYLOR, C. J.

Practice—Appeal to Supreme Court from order allowing final judgment.

Application by way of summons to judge in chambers for leave to appeal to Supreme Court from ruling of Full

Court confirming order of Killam, J., allowing plaintiffs to sign final judgment under A. J. Act; *ante*, p. 176.

It was objected that an appeal would not lie as this was an order made in the exercise of judicial discretion, within the meaning of sec. 27, Sup. Court Act.

Urged in reply, that this was a final judgment within the meaning of those words in *Bank of Minneseta* v. *Page*, 14 A. R., 347.

Held—

That the order appealed from was a final judgment and so appealable to the Supreme Court, but the objection that the order was not appealable, should properly have been made in the Supreme Court.

Objection was taken that the defendants, a municipality, could not be parties to the appeal bond, on the ground that this was beyond their powers under the Municipal Act.

Held—

That a municipality having the ordinary rights of suitors, to sue and be sued, could properly join in a bond in a suit in which they were parties, as an incident to such rights. The bond should be allowed.

Order made allowing bond and appeal, costs to abide event of appeal.

Perdue for plaintiffs.

Crawford for defendants.

GRANT v. HUNTER.

FEBRUARY 16, 1891.] [KILLAM, J.

Real Property Act--Dismissal of petition—Application for new trial—Grounds for.

The plaintiff was non-suited in an issue directed under Real Property Act, reported *ante*, p. 188. The defendant

then moved by way of summons to judge in chambers, to have the petition dismissed.

Held—

1. That the court had full discretion either to dismiss the petition, or allow the petitioner another opportunity of proving her claim.

2. That on such an application the court might properly inquire into the evidence at the trial and consult the judge before whom the trial was held.

"The petitioner asks now, merely to be allowed to strengthen the case which she previously attempted to make. The husband's affidavit is one of those offered to show that the case can be strengthened. He could have been called at the trial and was not . . . At any rate, another trial is asked merely to give evidence which could have been given before."

Held—

A new trial in such case should not be granted.

Petition dismissed with costs.

Ewart, Q. C., and *Bradshaw* for plaintiff.

Howell, Q. C., and *Cumberland* for defendant.

MERCHANTS' BANK v. GALBRAITH.

FEBRTARY 16, 1891.] [THE REFEREE.

Foreign judgment—Pleading—Striking out embarassing pleas.

The plaintiff sued on a foreign judgment recovered in the Common Pleas in Ontario in 1881. The defendant pleaded never indebted, payment, and the statute of limitations, as of six years. The plaintiffs moved to strike out the pleas as embarrassing, claiming that never indebted and payment, could not be so pleaded, and the plea of the

statute was improper, on the ground that the statute, if at all limited, is to twenty years.

Held,—

That the pleas of never indebted, and payment, were properly pleaded, and, if so advised, the plaintiff could apply to plead and demur to the plea of the statute.

Summons discharged with costs.

C. H. Campbell for applicant.

Cumberland for defendant.

THE

WESTERN LAW TIMES

NOTES OF RECENT DECISIONS.

*EXCHEQUER COURT OF CANADA.

BRADY v. THE QUEEN.

JANUARY 19, 1891.] [BURBIDGE, J.

Petition of Right—Demurrer—Personal injuries received on public work --Negligence of Crown's servants—Liability of Crown therefor.

Demurrer to petition of right.

The suppliant alleged in his petition that on a certain date he was driving slowly along a road in the Rocky Mountain Park, N. W. T., when his buggy came in contact with a wire stretched across the road, whereby the suppliant was thrown from his buggy to the ground and sustained severe bodily injury. He further alleged that the Rocky Mountain Park was a public work of Canada, under the control of the Minister of the Interior and the Governor-in-Council, who had appointed one S. superintendent thereof, that S. had notice of the obstruction to traffic caused by the wire and had negligently failed to remove it contrary to his duty in that behalf, and that the Crown was liable in damages for the injuries so received by him.

*Notes of Cases to appear in Vol. 2, Exchequer Court Reports, kindly furnished by L. A. Audette, Esq., Registrar of the Court of Exchequer.

The Crown demurred the petition on the ground that the claim and cause of action were founded in tort, and could not be maintained or enforced.

Held—

That the petition disclosed a claim against the Crown arising out of an injury to the person on a public work, resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties and employment, and therefore came within the meaning of 50-51 Vic. c. 16, s. 16 (c) which provides a remedy in such cases. *City of Quebec* v. *The Queen* (infra) referred to.

Demurrer over-ruled with costs.

Hogg, Q. C., in support of demurrer.

Chrysler, Q. C., and *Lewis* contra.

BERTRAND v. THE QUEEN.

JANUARY 19, 1891.] [BURBIDGE, J.

Damages to property from Government railway—The Government Railways Act, 1881, *s.* 27—*Claimant's acquiescence in construction of culverts, effect of—Negligence of Crown's servants—Estoppel.*

The suppliant sought to recover damages for the flooding of a portion of his farm at Isle Verte, P. Q., resulting from the construction of certain works connected with the Intercolonial Railway. The Crown produced a release under the hand of the suppliant, given subsequent to the time of the expropriation of a portion of his farm for the right of way of a section of the Intercolonial Railway, whereby he accepted a certain sum "in full compensation "and final settlement for deprivation of water, fence rails "taken, damage by water and all damages past, present "and prospective arising out of the construction of the "Intercolonial Railway," and released the Crown "from "all claims and demands whatever in connection therewith." It was also proved that although the works which caused

the injury were executed subsequent to the date of this release, they were undertaken at the request of the suppliant and for his benefit, and not for the benefit of the railway, and that with respect to part of them, he was present when it was being constructed and actively interfered in such construction.

Held—

1. That he was not entitled to compensation.

2. The Crown is not under an obligation to maintain drains or back-ditches constructed under 52 Vic. c. 13, s. 4.

Pouliot for claimants.

Hogg, Q. C., for the Crown.

CITY OF QUEBEC v. THE QUEEN.

JANUARY 19, 1891.] [BURBIDGE, J.

Petition of Right—Demurrer—Injury to property resulting from negligence of Crown's servants on public work—Crown's liability therefor— 50-51 *Vic. c.* 16, *s.* 16 (*c*)—*Interpretation.*

Demurrer to a petition of right.

The grounds upon which the petition was founded are as follows:—On the 19th of September, 1889, a large portion of rock fell from a part of the cliff, alleged to be the property of the Crown, under the Citadel at Quebec, blocking up a public thoroughfare in that city, known as Champlain street, to such an extent that communication was rendered impossible between the two ends thereof.

The suppliants charged in their petition that this accident was caused by the execution of works by the Crown which had the effect of breaking the flank side of the cliff, the daily firing of guns from the Citadel, and the fact that no precautions were taken by the Crown to prevent the occurrence of such an accident. The Crown demurred to the petition on the ground, *inter alia*, that no action will lie to enforce a claim founded on the negligence, carelessness or misconduct of the Crown or its servants or officers.

Held—

1. There being no allegation in the petition that the property mentioned was a work of defence or other public, or part of a public work, and it not appearing therein that any officer or servant of the Crown had any duty or employment in connection with the property mentioned, or that the acts complained of were committed by such officers while acting within the scope of their duties or employment, no case was shewn by the suppliants in respect of which the Court had jurisdiction under the Exchequer Court Act, 50-51 Vic. c. 16, s. 16 (*c*.)

2. Sec. 16 (*c*) of the said Act, is substantially a re-enactment of R. S. C., c. 40, s. 11, and under its provisions the Crown is liable in damages for any death or injury to property on any public work, when such death or injury arises either from the misfeasance or non-feasance of any servant or officer of the Crown while acting within the scope of his duties or employment.

3. The Crown's immunity from liability for personal negligence is in no way altered by section 16 (*c*) of the said Act.

Demurrer allowed with costs, and leave granted to suppliants to amend petition of right.

Hogg, Q. C., in support of demurrer.

Belcourt contra.

THE QUEEN v. THOMAS.

JANUARY 19, 1891.] [BURBIDGE, J.

Cancellation of a land patent—33 Vic. c. 52, s. 1—Improvidence in granting patent—Indian gratuity, effect of half-breed sharing in.

T., a half-breed, was on the 5th July, 1870, in actual peaceable possession of a lot of land in the province of Manitoba, previously purchased by him and of which he had been for some years in undisturbed occupancy. On

the 3rd of August, 1871, he shared in the gratituty given to certain Chippewa and Swampy Cree Indians under a treaty then concluded with them, and in the years 1871, 1872, 1873 and 1874 he participated in the annuities payable thereunder. But before taking any moneys under the treaty he enquired of the Commissioner who acted for Her Majesty in its negotiation, whether by accepting such money he would prejudice his rights to his private property, and was informed that he would not; and when in 1874 he learned for the first time that by reason of his sharing in such annuties he was liable to be accounted an Indian, and to lose his rights as a half-breed, he returned the money paid to him in that year. Subsequently his status as a half-breed was recognized by the issue to him in 1876 of half-breed scrip.

Held—

That under the Manitoba Act and amendments (33 Vic. c. 3, s. 32, s-s. 4 and 38 Vic. c. 52, s. 1) he was entitled to letters patent for the lot mentioned.

Aikins, Q. C., and *Culver*, Q. C., for Crown.

Howell, Q. C., and *Cumberland* for defendant.

---

*SUPREME COURT OF CANADA.

ARCHIBALD v. HUBLEY.

Bill of sale—Affidavit of bona fides—Form of jurat—Omission of date and words "before me"—Writ of execution—Signature of prothonotary.

The Nova Scotia Bill of Sale Act, R. S. N. S. 5th Ser., c. 92, s 4, provides that a bill of sale or chattel mortgage shall be void unless accompanied by an affidavit that the

*From the *Montreal Legal News*, March 26, 1891.

same was made in good faith for a debt due to the grantee, etc. By sec. 10 the expression "bill of sale" does not include an assignment for the general benefit of creditors. One E. assigned his property to A. in trust to sell the same and apply the proceeds to the payment of debts due certain named creditors of the assignor. The affidavit accompanying this instrument omited from the jurat the date and words "before me."

Held—

(Nov. 10, 1890) reversing the judgment of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that this instrument was not an assignment for the general benefit of creditors and was a bill of sale within the above section of the Act.

2. Also, that the affidavit required by said section must have all the requirements of affidavits used in judicial proceedings. Therefore the omission of the date and words "before me" from the jurat made the affidavit void and the defect could not be cured by parol evidence in proceedings by an execution creditor of the assignor to have the mortgaged goods taken to satisfy his execution.

3. *Per* Gwynne, J., that it is only when an affidavit is necessary to give the Court jurisidiction to deal with a matter before it that defects of form will invalidate it. In a case like this the affidavit is only an incident in the proceedings and the defect could be cured by evidence.

4. Also, *per* Gwynne, J., that an assignment of property absolute in its form and upon trust to sell the property assigned is not affected by said section four of the Act which deals only with bills of sale by way of chattel mortgage.

The goods assigned by E. were seized by the sheriff under an execution and in an action against the sheriff the execution produced was not signed by the Prothonotary of he court out of which it was issued.

5. That it is the seal of the court which gives validity to such writs and not the signature of the officer, and the want of such signature did not affect the validity of the execution.

Appeal allowed with costs.

W. B. Ross for the appellant.

Eaton, Q. C., for the respondent.

COSSETTE v. DUN *et al.*

QUEBEC.]

Appeal—Jurisdiction—Amount of controversy—Supreme and Exchequer Courts Act, sec. 29—Mercantile agency—Responsibility for communicating to a subscriber an incorrect report concerning the standing of a person in business—Damages--Discretion of Judge in the Court of first instance.

The plaintiff in an action for $10,000, for damages, obtained a judgment of $2,000. The defendant appealed to the Court of Queen's Bench where a judgment was reduced to $500 (M. L. R., 5 Q. B. 42.) The plaintiff then appealed to the Supreme Court and the defendant filed a cross appeal.

Held—

That the case was appealable to the Supreme Court, the the matter in the controversy being the judgment of the Superior Court for $2,000, which the plaintiff seeks to have restorred. (Taschereau and Patterson, JJ., dissenting.)

Held—

Also, per Ritchie, C. J., and Fournier and Gwynne, JJ. 1st. That persons carrying on a mercantile agency are responsible for the damages caused to a person in business by an incorrect report concerning his standing, though the report be only communicated to a subscriber to the agency on his application for information. 2nd. Reversing the judgment of the Court below, that the amount of damages awarded by the judge in his discretion in the court of first instance, there being no error or

partiality shown, should not have been interfered with by the court of appeal. *Levi* v. *Reed*, 6 Can. S. C. R. 482, and *Gingras* v. *Desilets*, Cassels, Digest 117, followed.

Appeal allowed with costs.

Belcourt for appellant.

Lash, Q.C., & *Girouard*, Q.C., for respondents.

HOBBS v. ONTARIO LOAN AND DEBENTURE CO.

ONTARIO.]

Mortgage—Re-demise clause—Creation of tenancy—Rent reserved—Tenancy at will—Agreement for lease—Specific performance—Excessive rent—Intention.

A mortgage of real estate provided that the money secured thereby, $20,000 with interest at seven per cent., should be paid as follows: $500 on Dec. 1, 1883, and on the first days of June and December in each of the years 1884, 1885, 1886, 1887, and $15,500 on June 1st, 1888. The mortgage contained the following clause:

"And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured, undisturbed by the mortgagees or their assigns, he, the mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectfully according to the said proviso, without any deduction."

The goods of the mortagagor having been seized under execution the mortgagees claimed payment as landlord under the said clause of a year's rent out of the proceeds of the sale of the goods under the Statute of Anne.

Held—

1. (Dec. 10, 1890) that it is competent for mortgagee and

mortgagor to create by agreement the relation of landlord and tenant between them.

2. Per Strong, Gwynne, and Patterson, JJ., affirming the decision of the Court of Appeal (16 Ont. App. R. 255) Ritchie C. J., and Taschereau, J., *contra*, that such relationship did not exist under the re-demise clause of the mortgage in this case, the amount purporting to be reserved aa rent under such clause being so largely in excess of the rental value of the premises as to indicate a want of intention in the parties to create such relationship.

3. *Per* Strong, J., that no tenancy at will was created by agreement, but such a tenancy could be held to exist by operation of the statute of frauds, the alleged lease being for a period of more than three years and not signed by mortgagee. The Imperial Statute, 8-9 Vic., c. 106, requiring leases for over three years to be made by deed (of which the Ontario Act is a re-enactment) does not repeal the statute of frauds, but merely substitutes a deed for the writing required by the latter statute.

Per Gwynne and Patterson, JJ., that no tenancy at will, by agreement or otherwise, was created by the re-demise clause of the mortgage.

4. Per Strong, J., Gwynne and Patterson, JJ,, *contra*, that the demise clause might be constructed as containing an agreement for a lease capable of being enforced in equity and, since the Judicature Act, to be treated by common law courts exercising the functions of courts of equity as a lease.

Per Gwynne, J., that the clause could only be regarded as an agreement for the creation of a tenancy in the future if the parties so desired, such agreement to be carried out by the execution of the mortgage by the mortgagees.

5. Per Strong, Gwynne and Patterson, JJ., that the demise clause could only be construed as purporting to create a tenancy for the entire term of five years, and it

could not be held a good lease for four and a half years at a rent reserved of $1000 a year and void for the remaining half year.

Appeal dismissed with costs.

Gibbons for appellants.

Moss, Q. C., for respondents.

MARTIN v. MOORE.

NORTH-WEST TERRITORIES.]

Appeal—Jurisdiction—Service of writ out of Jurisdiction—Order of judge—Final judgment—Practice.

A writ of summons, in the ordinary form of writs for service within the jurisdiction, was issued out of the division for the District of Alberta of the Supreme Court of the North-West Territories, and a judge's order was afterwards obtained for leave to serve it out of the jurisdiction. The writ having been served in England, the defendant moved before a judge of the Court below to set aside the service, alleging that the cause of action arose in England and he was, therefore, not subject to the jurisdiction of the courts in the Territories; also, assuming the Court had jurisdiction, that the writ was defective as the practice required that a judge's order should have been obtained before it issued. The motion was refused, and the decision of the judge refusing it was affirmed by the full court. The dedefendant then sought to appeal to the Supreme Court of Canada.

Held—

(March 11, 1891) Gwynne, J., *dubitante*, that the judgment sought to be appealed from was not a final judgment in an action, suit, cause, matter or other judicial proceeding within the meaning of the Supreme Court Act, and the Court had no jurisdiction to hear the appeal.

Appeal quashed with costs.

Chrysler, Q. C., for the appellant.

Moss, Q. C., for the respondent.

MOLSONS BANK v. HALTER.

ONTARIO.]

Preference—Defeating or delaying creditors—R.S.O. (1887) *c.* 24 *s.* 2*—Construction of Statute—Effect of words "or which has such effect"—Assignment by trustee to co-trustee—Pressure.*

W., a trader, was one of the executors of an estate and had used the estate funds in his private business. Having become insolvent, he gave a second mortgage on certain real estate to his co-executer as security for the money so appropiated. In a suit by a creditor to set aside the mortgage as void under R.S.O. (1887) c. 124, s. 2.

Held—

1. Affirming the judgment of the Court of Appeal for Ontario (16 Ont. App. R. 325), Patterson, J., dissenting, that the mortgage was not void under the said statute, the co-executor not being a creditor of W. within the meaning of the said section.

2. That the words "or which has such effect" in the section referred to, only apply to the clause immediately preceding, that is, to the case of giving one or more of the creditors of the transferor a preference over others, and do not apply to the case of defeating, delaying or prejudicing creditors.

3. That the preference mentioned in the statute as avoiding a conveyance must be a voluntary preference, and would not include a conveyance obtained by pressure on the transferor.

Held, per Strong, J., that W. by misappropriating the funds of the estate of which he was executor was guilty of a criminal offence, and the fear of penal consequence was sufficient pressure on him to take from the transaction the character of a voluntary conveyance.

Appeal dismissed with costs.

Bowlby, Q.C., for the appellants.

Aytoun-Finlay and *Duvernet* for the respondents.

PEOPLES LOAN CO. v. GRANT.

ONTARIO.]

Mortgage—Rate of interest—"Until principal is fully paid and satisfed" --Effect of provision—Rate after principal is due.

G. mortgaged certain real estate to the C. L. Ins. Co. giving certain policies of insurance on his life as collateral security. He afterwards made a declaration under the Ontario statute that the said policies should be payable to his wife and in case of her dying before him to his children. After this declaration was made he mortgaged the same property to the P. L. Co. giving the same policies as collateral, and the first mortgage was assigned to the P. L. Co., and was, in fact, paid off with the proceeds of the second loan. The mortgage to the P. L. Co. contained a provision that it was to be void on payment at a certain time of the principal and interest thereon at the rate of ten per cent. per annum "until fully paid and satisfied." In an action to have an assignment of the policies cancelled

Held—

1. (Dec. 10, 1890) that the P. L. Co. could only hold the policies as collateral security for the mortgage to the C. L. Ins. Co., and not as security for their own mortgage.

2. Further, that the mortage of the P. L. Co. only carried interest at the rate of ten per cent. until the principal was payable, and after that date the statutory rate governed. *Rykert* v. *St. John* (10 Can. S. C. R. 278) followed.

Appeal dismissed with costs.

Delamere, Q. C., for appellants.

Beck for respondent.

MANITOBA.

IN *RE* NICHOLSON v. THE RAILWAY COMMISSIONER.

FEBRUARY 20, 1891.] [BAIN, J.

Award—Expropriation for railway purposes—Erroneous finding of arbitrators—Setting aside.

This was an application by way of appeal against an award giving compensation for portions of land taken for railway purposes. The parties asking compensation were ice dealers, and the land taken was on the river bank situated in a peculiarly convenient position as regards the city, and for obtaining ice free from sewage. The amount of the award was $25,559. From this the railway commissioner appealed on the ground that the amount awarded was excessive, and that in allowing the amount the arbitrators proceeded upon erroneous principles.

One of the items of the award it appeared was given as damages for the prospective use of an endless chain for drawing the ice from the river into the warehouse instead of by team. It appeared that a great saving could be effected by the use of such endless chain, but owing to the railway running between the warehouse and the river the premises were unfitted for the use of such chain. The loss thereby caused was estimated at the loss for a number of years in business.

Held—

1. That under The Railway Act, 1881, which provided that owners shall be compensated for land taken and injuriously affected by the construction of the railway, and also providing that the compensation shall be estimated at the

value of the land at the time of the injury and not at the value of adjoining lands at the time of making the award, compensation may be given not only for the value of the land actually taken for the railway but also for the depreciation in the value of the remaining portion of the owners land resultant from the building and operation of the railway, *re Scott* v. *Railway Commissioner*, 6 M. R., 193.

2. That it is now established that an owner, part of whose land has been compulsorily taken, is entitled to be compensated not merely to the extent of the damages which have been recoverable in an action, but for all the damages, whether legal or not, which he has suffered in consequence of the exercise of the statutory powers. *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 265; *Cowper Essex* v. *Local Board of Acton*, 14 App. Ca. 178.

3. That the compensation to be given must be limited to that for injury that has been done to land or an estate or interest therein and apparently not for speculative or problematical injury. *Ricket* v. *Met. Ry. Co.*, L. R. 2 H. L. 173; *Beckett* v. *Midland Ry. Co.*, L. R. 3 C. P., 93; *Caledonian Ry. Co.* v. *Walker's Trustees*, 7 App. Ca., 259.

4. That the arbitrators should have taken and considered the property as it stood when taken for the railway, and that they should not have allowed anything because at some future time the railway would interfere with the owners using appliances in connection with their business which were not in use when the land was taken. See *Ripley* v. *G. N. Ry. Co.*, L. R. 10 Ch. App. 435.

Award reduced by the amount allowed for the endless chain $7000.

Costs of appeal allowed to railway commissioner, of award to owners.

Munson for owners.

Perdue and *Mathers* for railway commissioner.

IN *RE* SHAW.

FEBRUARY 24, 1891.] [KILLAM, J.

Certiorari—By-law and Provincial statute against keeping a common gaming house ultra vires.

Certiorari. Applicant was convicted of having unlawfully kept a gambling house in Winnipeg contrary to the provisions of a civic by-law which is claimed to have been authorized by a provincial statute empowering the city council to pass by-laws suppressing gambling houses. Sec. 37 Vic., c. 7, s. 96-8, 1873; 45 Vic., c. 36, s. 101, 1882; 53 Vic. c. 51, 1890.

Held—

That the provincial statute and the by-law were invalid being *ultra vires* on the ground that under B. N. A. Act, sec. 91, sub-sec. 27, a gambling house comes within the subject of "criminal law" and hence within the powers of parliament, and that such an offence must be punished by indictment or such other procedure as parliament may provide.

2. That at common law gambling was not in itself unlawful, though it was so to keep a common gaming house.

3. That Can. 38 Vic., c. 41, does not prevent the proof of the offence of keeping a common gaming house by such evidence as would have been sufficient at common law and before any games were made unlawful.

Certiorari to go.

Hough for City of Winnipeg.

C. P. Wilson for prisoner.

RITCHIE v GRUNDY.

MARCH 4, 1891.] [KILLAM, J.

Mechanics Lien Act—Agreement waiving lien.

This was a bill filed to enforce a Mechanics Lien under the Act, for building an addition to the defendant's residence

under a written contract, and for certain extras. The defendant denies completion and disputes the principal portion of the claim for extras. The contract provided for the payment of $500 by the defendant, $100 in cash, $200 during the process of the work, and $200 by note six months after the completion of the work. The only evidence offered, shewed completion and an agreement as to certain extras for which the plaintiff demanded the six months note for the balance due under the contract and was refused.

Held—

1. That where by the agreement of the parties the price of the work is not payable until the time for enforcing the lien is past, no lien exists. *Phillips on Liens*, p. 468; *Bisset* v. *Renilaw*, 25 Gr. 183.

2. That it is a well known principle with liens recognized at common law, that a lien does not exist where the contract between the parties, or the circumstances are inconsistent with the notion that one was intended. *Raitt* v. *Mitchell* 4 Camp. 476; *Spartali* v. *Benecke*, 10 C. B. 212; *Chase* v. *Westmore*, 5 M. and S. 180; *Carvell* v. *Simpson*, 16 Ves. 275; *Chandler* v. *Belden*, 18 Johns 158; *Randel* v. *Brown*, 2 How. (U. S.) 427; *Barley* v. *Adams*, 14 Wend. 201.

3. In view of the well known principle that an action will not lie for a debt until the time for payment has expired, an agreement that there shall be no lien should be implied under a contract merely for payment at a date later than that at which the bill could be filed to enforce the lien.

4. That if the contract is for the giving within the time for enforcing the lien, a promisory note or other security for the price, the agreement to waive the lien should be considered conditional upon the giving of the note or security. *Phillips on Liens*, 473; *McMurray* v. *Brown*, 91 U. S. S. C. 257.

"In view of certain variations in the contract, the plaintiff was to be entitled to a lien upon the lands described, if upon completion the defendant wrongfully refused to give the note "and upon other terms and conditions suited to the peculiar nature of the case."

Amendment allowed upon terms.

Mulock, Q. C., for plaintiff.

Aikins, Q. C., and *Patterson* for defendants.

RE MATHERS.

MARCH 7, 1891.] [FULL COURT.

Real Property Act—Taxation of half-breed land—Allotment.

Case stated by district registrar to judge in chambers under sec. 120, R. P. Act, and by said judge referred to Full Court. Certain lands were allotted some time prior to 1883, to one Ross as the child of a half-breed head of a family, but the Crown patent therefor was not issued till Jan. 28, 1886. Ross attained 18 years on Feb. 4, 1883. The land was sold on Nov. 21, 1887, for arrears of taxes for years 1882-4-5. The following question was submitted: "Was such sale for arrears of taxes for 1884-5, for which years the land was assessed to the allottee Ross, legal when the legal title remained in the Crown until Jany 28, 1886?"

By sec. 125, B. N. A. Act, "no lands belonging to Canada or any Province shall be liable to taxation."

By sec. 30, Man. Act, all ungranted lands in the Province shall be vested in the Crown and administered by the Government of Canada for the purposes of the Dominion.

Held—

1. That after the allotment of the land in question to the half-breed Ross he was precisely in the same position as he would have been had he agreed to purchase this land from the Crown and had become entitled to the patent;

while the legal estate remained vested in the Crown, the beneficial interest belonged to and was vested in Ross, and it was competent for the Provincial Legislature to make such interest liable to taxation if it saw fit to do so. *Railway Co.* v. *Prescott*, 83 U. S. Sup. Ct. 603, approved of.

By Mun. Act, 1883, sec. 239 and s. 4, s.s. 5, real property and "all rights thereto and interests therein" were made liable to taxation.

Held—

The interest or property of Ross was "real estate" or "real property" which both Acts (1883-1884) made liable to taxation, except such of it as was specially exempted, and the fact that this land is not specially referred to in these sections as one of the kinds of unpatented lands that may be taxed, should not be held to override the intention expressed in other provisions of the Acts, that it was liable to be taxed.

Question answered in affirmative.

C. P. Wilson for district registrar.

Mathers for applicant.

Present—TAYLOR, C.J., DUBUC and BAIN, JJ.

FONSECA v. SCHULTZ.

MARCH 7, 1891.] [FULL COURT.

Lien—Tax sale—Redemption of portion of land.

Bill to establish lien on certain lots. The plaintiff and defendant owned three parcels of land which were sold for taxes, each lot being sold separately. The plaintiff in seeking to redeem those parts of said parcels which she owned, was forced by the city treasurer to pay the whole amount of the arrears of taxes, interest thereon, and charges, for which the three parcels were sold. She then filed a bill to have a lien declared in her favor on the interest of the defendant in the said parcels.

The defendant demurred. Judgment by Bain J. overruling demurrer. Defendant appealed.

Sec. 667 of Mun. Act, 1886, provides for redemption by "the owner . . . or his executors, etc., . . . or any other person on their or his behalf, but in his name only," of "the estate sold, by paying or tendering . . for the use and benefit of the purchaser . . . the sum paid by him, etc." It contains no provision for the redemption of part of the land sold, and makes no mention of such redemption except in the concluding clause.

Held—

That it was necessary for the plaintiff to pay the taxes upon the whole land in order to secure her own portion. Section 638 refers to payment of taxes before sale and does not apply to this case, distinguishing same from Con. Stat. U. C., c. 55, s. 113, and *Payne* v. *Goodyear*, 26 U. C. R. 448, decided theron.

Appeal dismissed with costs.

Tupper, Q.C., and *Phippen* for defendant.

Andrews and *Harvey* for plaintiff.

Present—TAYLOR, C.J., DUBUC and KILLAM, JJ.

ARCHIBALD v. YOUVILLE.

MARCH 7, 1891.] [FULL COURT.

Demurrer—Pleading—Tax sale.

Appeal from decision of Bain J. allowing demurrer.

The facts are given *ante* p. 140.

The following additional cases were cited: *Hatch* v. *Buffalo*, 38 N. Y., 276; *Scott* v. *Onderdonk*, 14 N. Y., 9; *Ramsey* v. *Buffalo*, 97 N. Y., 114; *Stewart* v. *Crysler*, 100 N. Y., 378; *Susquehanna Bank* v. *Broome County*, 25 N. Y., 312; *O'Brien* v. *Cogswell*, 17 S. C. R., 420.

The chief justice in view of the extraordinary nature of the remedy by injunction, suggested that an application

should be made to the municipality to rescind the sale in view of the fact that since the time the sale took place, the council was empowered by Municipal Act, 1890, to rescind sales through error, and it did not appear that any such application had been made to the municipal council and that a refusal had been given, "if so the plaintiff would have been in a much stronger position than he is now."

Much stress was laid on the fact that the bill alleged that the municipality never assessed the lands or levied a rate.

Held—

1. If a deed were executed and registered, the court would entertain a suit to declare the same void and a cloud upon the plaintiffs title, but until the parties take the overt acts of executing and at least of accepting and claiming under the deed the court should not under circumstances such as are here alleged interfere or grant the extraordinary remedy by injunction. *McRae* v. *Corbett*, 6 M. R. On the allegations of the bill there was no right, either real or apparent, to make a sale of the land as being in arrear for taxes.

2. The deed, if executed, would not be evidence either of the assessment or of the imposition of the rates. The statute makes the deed conclusive evidence in certain particulars, but not of there being taxes in arrear for which the land could be sold. The deed is not made to be in itself evidence of anything beyond the particulars of which it is to be conclusive evidence.

3. That an application for an injunction should not be made without application to the municipality to rescind or redeem.

4. *Per Killam J.* "I am always inclined to look with distrust upon the decisions of most of the courts in the United States in matters of injunction. In most of the States injunctions are granted with a much freer hand than

with us. As the learned Chief Justice has shown, to support the bill we must go beyond the limits laid down in the Supreme Court of the United States and in the Courts of the State of New York, and I think that little advantage could result from a discussion of the decisions in some of the other States."

Appeal dismissed with costs.

Howell, Q.C., and *Cumberland* for plaintiffs.

Tupper, Q.C., and *Phippen* for defendants.

Present—TAYLOR, C.J., DUBUC and KILLAM, JJ.

RE ALEXANDER HAMILTON, DECEASED.

MARCH 10, 1891.] [ARDAGH, SURROGATE J.

Probate—Renunciation.

The following is the note made by the learned judge in this application :—

Deceased made a will in 1888 which was executed and attested in due form. It was given to the custody of one of the witnesses, a clergyman by whom it had been drawn up. In the following year testator had another document written out which he signed as his will and gave to the party who had written it to have it witnessed. The latter got two persons to subscribe to it as witnesses but not in the presence of the testator. The testator afterwards meeting the custodian of the first will requested him to destroy it and he did so. Two executors were named in the first will, but one of them became a purchaser of property from the testator and his mortgagor. Upon an application for probate it was held that the second will was inoperative, not being properly witnessed, and that the first one had not been revoked because it had not been destroyed in the presence of the testator as required by "The Wills Act of Manitoba." The custodian of the first will was able to furnish what he alleged to be a copy, or nearly so, of the will he had drawn up and witnessed

and probate was ordered to be issued to the executor who had no interest in the estate, the other executor having renounced.

Probate granted.

J. B. McLaren solicitor for petitioner.

PRACTICE.

MARTIN v. FREE PRESS.

FEBRUARY 22, 1891.] [KILLAM, J.

Practice—Pleading—Libel—Embarrassing plea—Justification.

The facts appear from the

Judgment—

I think that this appeal should be allowed and the plea restored. *Earl of Lucan* v. *Smith*, 26 L. J. Ex. 94, shews that under the old practice, leave would be given to plead that the alleged libel was a fair comment upon a matter of public interest along with the general issue, and much more should the Court not interfere actively to prevent its being pleaded where no leave is required. In the case cited, the first plea sought to be added was considered objectionable on account of the quantity of extraneous matter set up.

I think that a misapprehension has arisen in the case, out of the word "publication" in the plea. There could be nothing embarrassing or prejudicial to the plaintiff in the allegation that the words complained of formed a portion of an editorial article upon a certain subject, as the defendant could at the trial show this and insist on having the whole article read together. The defendant says then,

that the words complained of were published with the whole article, "which is the publication complained of" and that "the words complained of were fair comment" &c. It is evident that the word "publication" means here the act of publishing, not the article published, and there is then, no ambiguity in the expression, "the words complained of" which must be merely the words complained of in the declaration.

Appeal allowed and order of referee reversed, costs of appeal and original motion to be costs in the cause to the defendant in any event of the cause.

C. P. Wilson for plaintiff.

Bonnar for defendant.

EMPIRE BREWING AND MALTING CO. v. HARLEY.

FEBRUARY 23, 1891.] [KILLAM, J.

Contract ex juris--Order allowing service—Discretion of Referee—Reviewing same.

Action on contract brought in Manitoba on ground that defendant had assets therein of value of $200 at least, under 49 V., c. 35, s. 32, s.s. *e.* Appeal from order of referee dismissing a summons to set aside an order allowing service of writ under above statute, which requires that it be shown, in such an action, to the satisfaction of the court or a judge that the defendant has such assets.

The affidavit stated positively that the defendant had such assets; that an insurance company doing business at Winnipeg, having a branch office and local agent at Winnipeg, was indebted or liable to the defendant; that the plaintiffs had attached the sum of $600 in the hands of that company which then held that amount in the hands of the local agent at Winnipeg to answer the attaching order when judgment should be recovered. The defendant had no other assets within the jurisdiction than the liability of

the insurance company. The affidavit did not expressly show the company to be within the jurisdiction so as to bring it within the Q. B. Act, sec. 43, in respect of a "matter or thing arising within the Province."

See *ante* Notes of Cases, p. 124.

Held—

That the referee was right in granting the order on such evidence. *McArthur* v. *Macdonell*, 1 M. R. 334, referred to.

The defendant filed an affidavit in which he stated broadly that he had no assets in Manitoba, but it was uncertain whether he based this statement upon facts which would make the debt unattachable, or upon its alleged assignment.

Held—

That the general statement was insufficient to meet the allegation of the attachment.

"The referee having been satisfied, and being still satisfied, by the evidence, the *onus* is upon the defendant to show that the original order should not have been issued. This is the rule where a party has been arrested under a *capias* and applies for his discharge. *Steward* v. *Waugh*, 33 L. J. Q. B. 86. For this reason I think it was for the defendant to show both that the insurance money was payable and the insurance contract made out of Manitoba. It would not be sufficient for him to place it in doubt and call upon the plaintiff to show that the insurance company was amenable to the attaching order."

The original order was objected to because of its form, and also that the same had not been served or filed before the declaration had been filed.

Held—

That while the original order was certainly objectionable in not giving a certain time to plead after service of the same and declaration, yet as no rule in this respect was

laid down by the statute or rule of court, and as the referee had amended the order in his reasonable discretion, unless some absolute injustice were done a judge should not interefere with that discretion.

Application dismissed with costs to be costs in cause to plaintiff in any event.

Davis for plaintiff.

C. P. Wilson for defendants.

GILLESPIE v. LLOYD, *et al.*

FEBRUARY 26, 1891.] [BAIN, J.

Demurrer—Wrong parties—Shareholders right in a corporate company.

Bill filed by a shareholder on behalf of himself and of all other the shareholders of the H. B. Ry. Co. against the holders of certain bonds which he claims were issued by the president without authority and asking that they be declared not to be a charge on the property or land grant, and praying delivery up of same. His bill alleges that shortly after the company was incorporated and before the year 1886 the plaintiff became a shareholder thereof by being the owner of a portion of the capital stock thereof and has ever since remained on the books of the company a shareholder thereof and is recognized by the railway company as a shareholder." The bill also alleges that the plaintiff has repeatedly called upon and urged the directors and officers of the company to take legal proceedings to prevent the sale or other disposition of the bonds and to have same declared to be improperly issued, but that they neglected and refused.

Demurrer on two grounds: 1. That the allegation above given of the plaintiffs title is not a sufficient one, and that what is stated is merely a conclusion of law, and, 2. That even if the plaintiff is a shareholder the bill does not dis-

close such a state of circumstances as enables him to sue in his individual capacity.

The term "shareholder" is indefinite, although apparently the allegation of title was not sufficient yet it was not necessary to a decision and so not decided, *Willburn* v. *Negleby*, 1 M. & K. 51; *Hamilton* v. *Desjardins Canal Co.*, 1 Gr. 1; *Banks* v. *Porter*, 16 Si, 176.

Held—

1. That actions by one member of a class on behalf of himself and all others of that class are permissible when the object of the suit is to obtain relief to which the whole class is entitled, and when the members of the class are so numerous that they cannot all be made parties by name, (that is an action might be permissible on the ground of necessity or convenience); but when a company is incorporated and its officers and directors have done or are doing something that is illegal and which affects the whole company, then under ordinary circumstances it is the company that ought to sue in its corporate name. *Foss* v. *Harrbottle*, 2 Hare, 401; *Russell* v. *Wakefield Water Works Co.*, L. R. 20 Eq., 477; *Davidson* v. *Grange*, 4 Gr., 377; *Brogdin* v. *Bank*, U. C. 13 Gr., 544; *Gray* v. *Lewis*, L. R. 8 Ch.

2. That there might be an exception to the general rule arising from the necessities of the case, and in order that there might not be a failure of justice and in order to prevent oppressive litigation it should not be allowed to prevail in cases where there is no necessity for it, as in this case.

Demurrer allowed with costs.

Howell, Q.C., and *Tupper*, Q.C., for plaintiff.
Ewart, Q.C., and *Bradshaw* for defendants.

BEALL v. CONFEDERATION LIFE.

MARCH 4, 1891.] [KILLAM, J.

Costs of mortgagee—Bill for redemption.

Bill to redeem a mortgage. The only question was as to costs.

Judgment—

"In this case there was no tender. The plaintiff was never in a position to pay the amount due. The utmost that is claimed is that if the right to redeem had been admitted and the amount claimed not excessive, the money could have been obtained. But all that was done in fact was to suggest that a compromise would be desirable. It was never put to the defendants that the plaintiff was prepared to redeem in a way that called upon them to accept or refuse so as to dispense with a tender. They never did refuse redemption. In this suit, although not admitting the right, they submit to be redeemed. Undoubtedly they could have been compelled to allow redemption, but under the circumstances I cannot find any refusal to do so which rendered the suit unnecessary or that the position taken in the answer disentitles them to costs."

Dictum of Lord Selborne in *Cotterell* v. *Stratton*, L. R. 10 C. P. 299, "the right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit unless he has forfeited them by some improper defence or other misconduct is well established" followed, as also *Gammon* v. *Stone*, 1 Ves. 339; *Kennaird* v. *Trollope*, 42 Ch. D. 610.

Usual decree directed.

Cameron for plaintiff.

Dawson for defendants, the Confederation Life.

Nason for defendant, J. K. McDonald.

DOUGALL v. LEGGO.

MARCH 7, 1891.] [FULL COURT.

Prohibition—Jurisdiction—Abandonment of excess.

Appeal from judgment of Bain J., reported *ante* p. 203, which see for facts.

Held—

1. That the provisions of the County Courts Act relating to attachments must be held as referring back to the previous provisions which deal generally with the jurisdiction of the court, overruling Bain J.

2. That section 2, sub-section 41, County Courts Act, 1887, and sec. 45, are utterly irreconcilable and contradict one another.

3. That a prohibition will not go for a mere irregularity in the proceedings. *Mayor of London* v. *Cox*, L. R. 2 H. L. 276.

Per Killam J., dissenting—

4. That the court being an inferior court and having only the jurisdiction conferred by statute, that jurisdiction must not be presumed where it is not distinctly given, and that in view of the conflict prohibition must be granted.

Appeal dismissed with costs.

Elliott for plaintiff.

Davis for defendant.

Present—TAYLOR, C.J., DUBUC and KILLAM, JJ.

McDONALD v. CAN. PAC. RY. CO.

MARCH 7, 1891.] [FULL COURT.

Practice—C. L. P. A.—Discovery—Proper party to make affidavit.

Appeal from judgment of Mr. Justice Bain affirming order made by referee dismissing summons taken out by plaintiff, after issue joined, under sec. 50, C. L. P. A., 1854, calling upon defendants to shew cause why "such officer or officers of the defendant corporation as may upon hearing

of the parties be deemed proper, should not forthwith or within such time or times as may be deemed proper, answer on affidavit stating what documents, including all books, papers and writings whatsoever, the defendants have in their possession or power relating to the matters in dispute in this cause, or what he or they respectively know as to the custody they or any of them are in, and whether the defendants object (and if so on what grounds) to the production of such as are in their possession or power." The summons was supported by the affidavits of McRae, one of the plaintiffs, and of their attorney, which latter verified a copy of the pleadings. In answer were filed the affidavits of Mr. White, general superintendent of a portion of the railway including the part of it which is within this Province, the assistant general superintendent, and of defendants attorney.

Held—

1. The objection that the granting or refusing an order for discovery is so entirely within the discretion of the judge that an appeal from him will not be entertained, cannot prevail.

2. In support of such an application as the present there must be an affidavit from the plaintiff, but not from all the plaintiffs if more than one. *Kingsford* v. *Gt. Wes. Ry. Co.*, 16 C. B. N. S., 751; *Hewett* v. *Webb*, 2 Jur. N. S., 1190, followed.

The defendants were a foreign corporation having their head office at Montreal. The plaintiffs brought the action in Manitoba under 49 V., c. 35, s. 32, allowing service of the writ. Mr. Whyte, the chief officer residing in Manitoba, is the general superintendent for the division of the line passing through Manitoba. The cause of action arose in British Columbia outside his jurisdiction. He did not give any instructions for the defence of the action which came from outside officials.

Held—

1. That the attorney could not make such an affidavit and it could not be a part of the general superintendent's duty to inform himself respecting causes of action against the company arising wholly beyond his division and not intending to affect it.

2. The court could not properly direct that the general superintendent should turn from his regular duties and undertake a matter wholly foreign to his employment for the purpose of procuring the discovery desired; and to attempt to enforce performance would be an unwarrantable exercise of authority by the court.

Appeal dismissed with costs.

Cassidy for plaintiff.

Culver, Q.C., and *Pitblado* for defendants.

WHITLA v. McCUAIG.

MARCH 12, 1891.] [DUBUC, J.

Practice—Final judgment—Liquidated demand.

Appeal from Referee's refusal to plaintiff to sign final judgment upon a specially endorsed writ on a foreign judgment.

The objection raised was that a foreign judgment was not a liquidated demand within the meaning of s. 34, Q. B. Act, 1885.

Held—

1. That a foreign judgment was a "liquidated demand." *Wodsall* v. *Banter*, E. B. and E. 884; *Grant* v. *Easton*, 13 Q. B. D. 202; *William* v. *Jones*, 13 M. and W. 633; *Martel* v. *Dubord*, 3 M. R. 598.

2. That although there was no evidence that a copy of the order allowing service *ex juris*, was served on the defendant, yet by entering an appearance any irregularity

was waived. The defendant was allowed to shew whether he had a defence on the merits.

Appeal allowed with costs.

Elliott for plaintiff.

Hough for defendant.

RE J. B. McCARTNEY.

MARCH 20, 1891.] [DUBUC, J.

Extradition Act—Forgery—Interested witness—Corroborative evidence.

The accused was arrested under The Extradition Act for forgery of promisory notes in the United States. Telegrams were produced from prisoner after his arrest to parties defrauded, offering a compromise. One of the alleged makers of the notes was called to prove the forgery of his name by the accused to one of the notes.

It was objected that the evidence of the alleged maker should be corroborated as he was an "interested" party within the meaning of The Criminal Procedure Act, s. 218.

Held—

1. That this proceeding was not taken for the purpose of sustaining a conviction nor is it taken in support of a prosecution. This is an investigation only, not a prosecution, and the clause at the end of sec. 54 does not apply because it refers to prosecutions by "indictment" or "information."

Prisoner committed for extradition.

Cameron and *Perdue* for State of Ohio.

Howell, Q.C., and *Hagel*, Q.C., for accused.

McMICKEN v. ONTARIO BANK.

MARCH 21, 1891.] [THE REFEREE.

Practice—Short notice of motion.

Leave to serve short notice of motion was expressed in the copy served in these words, "And this notice is given

"by leave of the Referee given at three o'clock of the "afternoon of this day. Such leave being to serve this "notice before four o'clock of this afternoon of this day. Dated, etc."

It was objected that the notice did not shew that leave for "short" service had been obtained.

Held—

That the objection was fatal following *Dawson* v. *Beeson*, 22 Ch. D., 504.

Motion dismissed with costs.

Kennedy, Q. C., for motion.

Bradshaw contra.

LEVEQUE v. JOYAL.

MARCH 21, 1891.] [ARDAGH, Co. J.

Election petition—Irregularities in procedure.

This was an application under the new procedure provided in The Municipal Act, 1890, for the declaring vacant of seats of municipal councillors. The application was based on want of property qualification. In the Imperial Act from which our Act is taken, security is given by recognizance before justices. The clauses in our Act are similar in verbiage but provide that security is to be given by bond. Both Acts however, provide that security shall be given to the petitioners' witnesses for their costs as well as to the respondent. This was given in England by recognizance to the Queen, but here a bond could not be given to the respondent to meet the requirements of the statute. It was given then to the judge to pay the costs to him, or such person as he might direct. The bond was for $100, and the petitioner joined with four other sureties but he did not justify. The others did.

No objection was made to the security within the time prescribed by the Act. A summons was taken out "to set

aside and vacate the appointment for the hearing," which had been served, and "that it be held and directed that no further proceedings be had upon the said petition."

Upon the grounds: *inter alia.*

1. That the petitioner did not serve upon the respondent a notice of the nature of the security furnished by the petitioner upon the petition as required by the said Act, the notice given not stating the tenor or condition of the bond therein referred to, or that the obligation was to or in favor of the respondent but on the contrary that the sureties were held and bound unto William Davis Ardagh therein mentioned.

The "nature" of the security was said in the notice to be "by bond to W. D. A. in the sum of $100" and it also gave the names of the sureties.

2. That no security was given as prescribed by the said Act upon the said petition because:

(a) The bond was entered into by more than four sureties.

(b) The same was not of obligation to the respondent and no provision was made for assignment of same to him.

Held—

Not fatal.

Summons dismissed with costs.

Prendergast and *Huggard* for petitioner.

Cassidy for respondent.

THIBAUDEAU v. COOMBS.

MARCH 30, 1891.] [TAYLOR, C.J.

Real Property Act—Petition.

The applicant for a certificate of title claimed under a tax deed. A caveat was filed by some registered judgment creditors of the original patentee from the Crown. Upon the hearing of the petition it was objected by the

caveatee that the petition did not shew that the judgment debtor had any interest in the land at the time of the registration of the certificate of judgment. The petition after setting out that an application had been made by the caveatee, to have a certificate of title issued to him, stated that the caveators claimed to be interested in or entitled to a lien on the lands in question because one of the judgment creditors was the patentee from the Crown. It was urged in reply that an application should have been made to quash the caveat if the judgment debtor had no interest, and the objection should not be allowed upon the hearing of the petition. It was admitted also, that the allegation in the caveat was in the same terms.

Held—

That the objection was not fatal. Issue directed.

Huggard for caveator.

O. H. Clark for caveatee.

RE R. L. ASHBAUGH, AN ATTORNEY.

MARCH 31, 1891.] [THE MASTER.

Attorney—Striking off rolls—Criminal charge—Master's report.

In this matter on Feb. 20 last the Master made his report which was filed on the 21st. The solicitor for the Law Society set the rule *nisi* down for hearing on Tuesday, March 24th, it having been enlarged till after the Master had made his report. See *ante* pp. 108 and 13. The rule was argued before the chief justice on March 31st ult., and the same now stands for judgment.

The report of the master is as follows:—

Pursuant to the rule of court dated eleventh day of October, A.D. 1890, I was attended by counsel for the Law Society and for the attorney, Roderick Leander Ashbaugh.

The affidavits and papers filed on the application to the court were brought before me, and affidavits of Patrick

Lawlor and James Wesley St. John were filed by the Law Society.

Affidavits of Patrick O'Connor, Adam Davidson, Roderick Leander Ashbaugh, Martin Cogan and George Velie, were filed by the attorney.

Patrick O'Connor, Adam Davidson and Roderick Leander Ashbaugh, were examined upon their affidavits, and affidavits of William John Carrlon, Edward McKeown and William Angus McDonald, were filed in reply by the Law Society and the evidence closed.

After hearing arguments of counsel for the Law Society and for the said attorney, and considering all the evidence and papers, I find that the conduct of Roderick Leander Ashbaugh in and about certain criminal proceedings before the police magistrate of the city of Winnipeg, in which certain persons were charged with an attempt to kill and murder, was such as to render him unworthy of remaining on the rolls of barristers and attorneys in this Province.

All of which I humbly certify and submit to this honourable court with the affidavits, papers and evidence.

Howell, Q.C., and *Wade* for the Law Society.

Ewart, Q.C., and *Hagel*, Q.C., for the attorney.

MANN v. WINNIPEG & HUDSON'S BAY RAILWAY COMPANY.

MARCH 31, 1891.] [TAYLOR, C. J.

Company—Examination of officer—Production of company's books.

The facts appear from the

Judgment—

The defendants, judgment debtors, appeal from an order made by the referee under sec. 52 of the Administration of Justice Act, for the examination of the president as an officer of the company, and for production by the company of books, papers and documents, in so far as it

requires production by the company. The argument is, that, while under sub-sec. 2 of sec. 52, the examination of an officer may be ordered, the statute nowhere gives the court power to order production by the company. The Act, it is said, is an enabling one and must be construed strictly.

I dismiss the appeal. Sec. 52 says, a rule or order may be made, for the examination of the judgment debtor and for the production of all or any of his books, papers and documents. By sec. 2, sub-sec. 3, the words "judgment debtor" include a corporation foreign or domestic. Therefore, under sec. 52, the court or a judge may make an order for the examination of a judgment debtor corporation, and for the production of all or any of its books, papers and documents. All that sub-sec. 2 does, is to provide that, where the judgment debtor is a corporation, then the officers liable to be examined shall be the same officers as those mentioned in sec. 134, which provides for examination for discovery. The authority of the court to order examination in the case of a corporation is not derived from sub-sec. 2, but from the section itself, and that gives as ample power to order production as examination. In *Jukes* v. *Winnipeg and Hudson's Bay Railway Co.*, 5 M. R. 14, the court held that the order cannot be for production by its officer.

The appeal is dismissed with costs.

Munson for plaintiffs.

Phippen for defendants.

Stanford Law Library
3 6105 061 704 941